IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____, Misc., October Term, 1987

87-5765

KEVIN N. STANFORD,
Petitioner,
V.
COMMONWEALTH OF KENTUCKY,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes the petitioner, Kevin N. Stanford, by counsel, and respectfully requests leave to file the accompanying Petition for a Writ of Certiorari to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner states that he has proceeded as a pauper without the payment of fees or costs through the proceedings in the state appellate court below. The petitioner was found by the Kentucky state courts to qualify as an indigent and counsel was appointed to represent him at trial in Jefferson Circuit Court, Louisville, Kentucky and on direct appeal to the Kentucky Supreme Court. Counsel from the Office of the Jefferson District Public Defender was appointed by the Jefferson Circuit Court to represent the petitioner at trial and on appeal. An affidavit of indigency is attached.

The petitioner is, therefore, entitled to proceed herein without payment of fees, costs or giving of security therefor.

CERTIFICATE

I hereby certify that a copy of this motion was served by depositing the same in a United States mailbox, with first class postage prepaid, to Mr. David A. Smith, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601 on October 30, 1987.

FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____, Misc., October Term, 1987

87-576!

KEVIN N. STANFORD,
Petitioner,

V.

COMMONWEALTH OF KENTUCKY,
Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Kevin N. Stanford, being first duly sworn, depose and say that I am the petitioner in the above-styled case; that in support of my motion to proceed an appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; I believe that I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting this proceeding are true.

1. Are you presently employed?

NO

a. If the answer is yes, state the amount of your salary or wages per month, the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Never been employed

2. Have you received within the past twelve (12) months any income from a business, profession, or other form of self-employment or in the form of rent payments, interest, dividends or other sources?

NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve (12) months.

3. Do you own any cash or checking or savings account?

NO

a. If the answer is yes, state the total of the items owned.

4. Do you own any real estate, stocks, bonds, notes automobiles, or any other valuable property (excluding ordinary household furnishings or clothing)?

NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

K.N. Stanford PPD
KEVIN N. STANFORD

COMMONWEALTH OF KENTUCKY

COUNTY OF LYON

SUBSCRIBED AND SWORN to before me by Kevin N. Stanford on October 12, 1987.

My commission expires: November 17, 1990.

Bobby Lott
NOTARY PUBLIC, STATE AT LARGE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____, Misc., October Term, 1987

KEVIN N. STANFORD,
Petitioner,
V.
COMMONWEALTH OF KENTUCKY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

FRANK W. HEFT, JR.
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(502) 587-3800
COUNSEL FOR PETITIONER

DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

CERTIFICATE

I hereby certify that a copy of this Petition was served by depositing same in a United States Postal Service Mailbox, with first-class postage prepaid and addressed to Mr. David A. Smith, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on October 30, 1987.

FRANK W. HEFT, JR.
COUNSEL FOR PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, Kevin N. Stanford, prays that a Writ of Certiorari be issued to review the decision rendered by the Supreme Court of Kentucky herein.

QUESTIONS PRESENTED

I. ARE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS VIOLATED WHEN A STATE APPELLATE COURT, IN A CAPITAL CASE, ADOPTS A NEW RULE OF ERROR PRESERVATION THAT ADVANCES NO LEGITIMATE STATE INTEREST, CONSTITUTES A SUBSTANTIAL DEPARTURE FROM PREVIOUSLY WELL-ESTABLISHED RULES GOVERNING PRESERVATION OF ERROR, AND PRECLUDES DEFENSE COUNSEL, DURING THE VOIR DIRE EXAMINATION FROM DETERMINING WHETHER ANY JURORS WOULD AUTOMATICALLY IMPOSE THE DEATH PENALTY REGARDLESS OF THE CIRCUMSTANCES OF THE CASE?

DOES APPLICATION OF THIS NEW RULE OF ERROR PRESERVATION TO THE PETITIONER'S CASE VIOLATE DUE PROCESS OF LAW?

II. DO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS REQUIRE THAT A DEFENDANT FOR WHOM THE PROSECUTION IS SEEKING THE DEATH PENALTY BE GIVEN A SEPARATE TRIAL FROM A CO-DEFENDANT FOR WHOM THE PROSECUTION IS SEEKING A MAXIMUM SENTENCE OF LIFE IMPRISONMENT?

III. ARE THE EIGHTH AND FOURTEENTH AMENDMENTS VIOLATED BY EXCLUDING, DURING THE PENALTY PHASE OF A CAPITAL CASE, MITIGATING EVIDENCE PRESENTED BY A FORMER DEATH ROW INMATE WHO WORKED AS A JUVENILE COUNSELOR AND OFFERED TESTIMONY NOT ONLY ABOUT HIS PERSONAL EXPERIENCE WITH THE PETITIONER PRIOR AND SUBSEQUENT TO THE ALLEGED CRIMES BUT ALSO OFFERED TESTIMONY ABOUT THE REHABILITATIVE PROGRESS AVAILABLE WITHIN THE ADULT PENAL SYSTEM?

IV. DO THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRE THAT A JURY BE INSTRUCTED IN THE PENALTY PHASE OF A CAPITAL CASE THAT THE ACCUSED IS NOT REQUIRED TO TESTIFY AND THAT NO ADVERSE INFERENCE CAN BE DRAWN FROM HIS SILENCE?

V. DO THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THAT THE JURY BE INSTRUCTED DURING THE PENALTY PHASE OF A CAPITAL CASE THAT THE DEATH SENTENCE NEED NOT BE IMPOSED EVEN IF AN AGGRAVATING CIRCUMSTANCE IS PROVED BEYOND A REASONABLE DOUBT?

VI. WHEN THE ACCUSED'S INCRIMINATING STATEMENT IS SUPPRESSED BECAUSE IT WAS OBTAINED IN VIOLATION OF THE RULE ENUNCIATED IN EDWARDS V. ARIZONA, 451 U.S. 477 (1981) AND/OR THE SIXTH AMENDMENT RIGHT TO COUNSEL, DO THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS REQUIRE THAT THE DIRECT AND INDIRECT FRUITS OF THAT STATEMENT BE SUPPRESSED AS EVIDENCE?

VII. ARE THE SIXTH AND FOURTEENTH AMENDMENTS VIOLATED IN A JOINT TRIAL BY THE ADMISSION OF THE STATEMENT OF A NON-TESTIFYING CO-DEFENDANT WHICH MAKES REFERENCE TO THE PETITIONER AS "THE OTHER PERSON" AND THE JURY IS NOT ADMONISHED THAT THE STATEMENT CANNOT BE USED AS EVIDENCE OF THE PETITIONER'S GUILT?

VIII. DOES THE IMPOSITION OF THE DEATH PENALTY ON A JUVENILE CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS?

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Following a jury trial, the petitioner, Kevin N. Stanford, was convicted of murder [Ky. Rev. Stat. (KRS) 507.020], first degree robbery (KRS 515.020), first degree sodomy (KRS 510.070) and receiving stolen property over $100.00 (KRS 514.110). By a final judgment entered on September 28, 1982, the petitioner was sentenced to death on the murder conviction, 20 years on the robbery and sodomy convictions and 5 years on the receiving stolen property charge. The terms of imprisonment were ordered to run consecutively (Transcript of Record (TR) No. 82CR0406 at pp. 401-404; Appendix to Certiorari Petition (App.) at pp. 36-39).

On April 30, 1987, the petitioner's convictions and death sentence were affirmed by the Kentucky Supreme Court. Stanford v. Commonwealth, Ky., 734 S.W.2d 781 (1987). (App. 10-35).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3). The Kentucky Supreme Court affirmed the petitioner's conviction and death sentence on April 30, 1987 (App. 10-35). On June 3, 1987, the petitioner tendered to the Kentucky Supreme Court a 45 page petition for rehearing and a motion for leave to file a petition in excess of the 10 page limit enunciated in Kentucky Rule of Civil Procedure (CR) 76.32(3)(d) (App. 9). On June 29, 1987, the motion was denied and the petitioner was ordered to file a petition for rehearing with a maximum of 10 pages by July 10, 1987 (App. 8). On that date the petitioner filed a 10 page petition for rehearing (App. 7) and a motion to reconsider the order of June 29, 1987 (App. 6).

On September 3, 1987, the Kentucky Supreme Court denied the petition for rehearing and the motion to reconsider (App. 5). This petition is timely filed within 60 days of the denial of the petition for rehearing. Sup. Ct. R. 20.4.

On September 4, 1987, the Kentucky Supreme Court granted the petitioner a stay of execution of his death sentence to and including December 3, 1987. (App. 2).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are the Fourth, Fifth, Sixth and Eighth Amendments and Section One of the Fourteenth Amendment. They are reproduced in the Appendix at p. 1).

STATEMENT OF THE CASE[1]

A. Material Facts.

In the early morning hours of January 8, 1981, Jefferson County, Kentucky, police officers found the body of a service station attendant, Baerbel Poore, in the backseat of her car. She had sustained a non-fatal gunshot wound to the left side of the face and a fatal gunshot wound to the right side of the head near the ear. (TE III, 364, 400-401). Two gallons of gasoline, a two gallon gasoline container, $143.07 in cash and 300 cartons of cigarettes were taken from the service station where she worked. (TE VII, 942, 944-946).

The police learned that cigarettes which may have been taken from the service station were being sold by Owen Smyzer and Alexis Sloan. (TE III, 407; TE IV, 456-457). Sloan said he saw the petitioner and the co-defendant, David Buchanan, together about 9:00 p.m. on January 7, 1981.[2] About 11:30 p.m., Sloan said he saw the petitioner with two boxes of cigarettes which he wanted Sloan to hold for him. (TE VII, 1003-1008). Sloan said that the petitioner told him on January 8 that he stole the cigarettes from the service station and that a friend of his killed the woman at the service station. (TE VII, 1010-1023).

On January 13, 1981, the petitioner was questioned by police about the cigarettes. He denied any knowledge about them and was released after questioning. (TE III, 408-409; TE IV, 516-518). The petitioner was arrested later that evening, on information developed

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1. References to the Trial Transcript of Evidence are made TE, Volume and Page. Reference to transcripts from other hearings are made TE, Date, Volume and Page.

2. This Court recently heard and decided the case of the co-defendant. See Buchanan v. Kentucky, ___ U.S. ___, 107 S.Ct. 2906 (1987).

from Owen Smyzer, on a charge of receiving stolen property. During the search of the petitioner's apartment on January 14, 1981, the keys belonging to a service station were found. (TE III, 473-478, 495).

Information was also developed from the petitioner that Calvin Buchanan, who was David Buchanan's uncle, may have been involved in the crime. An arrest warrant was issued for Calvin and his house was searched, pursuant to a warrant, on January 14, 1981. No evidence was recovered in the search. (TE III, 410-411; TE IV, 472-473, 523).

On January 16, 1981, while incarcerated in jail on this crime, Calvin agreed to allow the police to tape record a telephone conversation between him and David Buchanan. The police then brought David to headquarters for questioning about the crimes. (TE III, 411-412; TE IV, 478-479, 532-533).

David Buchanan gave the police an oral statement implicating himself, the petitioner and Troy Johnson in the crimes. (TE III, 417-420; TE IV, 481-486; App. 44-49). Johnson was arrested and a two gallon gasoline can which was identified as the one taken from the service station was recovered in a field adjacent to Johnson's brother's residence. (TE III, 420-421; TE IV, 487-490).

The petitioner, David Buchanan, and Troy Johnson were juveniles and proceedings against them were commenced in juvenile court. Johnson pleaded guilty in juvenile court to his involvement in the crimes and was sent to a juvenile camp. (TE VII, 1029, 1048). The juvenile court waived its jurisdiction over the petitioner and Buchanan and they were jointly tried as adults in Jefferson Circuit Court. (TR 81CR1218, 18-21, 28-31; App. 40-42). Buchanan did not testify at trial although his statement was admitted into evidence over the objection of the petitioner. (TE IV, 482; App. 45). Johnson testified at trial that David Buchanan asked him to get him a gun to commit a robbery on January 7, 1981. Johnson supplied Buchanan with a gun and some ammunition and, according to Johnson, Buchanan then called the petitioner. Johnson, accompanied by Buchanan, drove to the petitioner's apartment. Johnson said he waited in his car while the petitioner and the co-defendant went into the service station. (TE VII, 1030-1084). Sometime later, Buchanan returned to the car and

told Johnson that he had had sex with the service station attendant. Buchanan told Johnson to follow a car that was being driven away from the service station. When the car stopped, Johnson stopped his car behind it. Johnson accused the petitioner of doing the shooting. (TE VII, 1035-1038, 1044).

Kerise Ison and Amona Dorsey testified that they drove upon the crime scene just as the shots were being fired. Both women said they saw two men walking away from a car which was subsequently identified as the victim's car. The men walked past Ms. Dorsey's car and got into a third vehicle. The women then drove away from the area. At a line-up, both women identified Calvin Buchanan as one of the men they saw. Neither woman identified the petitioner as one of the men they saw that night. (TE IV, 534-536; TE VII, 954-992; TE 3-9-82, Vol. II, 167-169, 182).

As noted in Argument II, there was scientific and physical evidence refuting Johnson's allegation that the petitioner was the individual who did the actual shooting. Moreover, there was no physical or scientific evidence which directly connected the petitioner to the murder and sex offenses. Similarly, the oral statements allegedly made by the petitioner to jail guards were not corroborated by any evidence other than the self-serving testimony of Johnson. (TE VIII, 1063, 1076-1082). Further facts will be developed as necessary to support the petitioner's reasons for granting review.

B. Raising the Federal Constitutional Issues.[3]

Question I - In a pre-trial hearing, the judge indicated that he would ask only one question to determine the jurors' qualifications to participate in a capital case. (TE 3-1-82, 10-11; App. 70-71). The judge also stated (TE 3-1-82, 22-23; App. 75-76):

> THE COURT: The first thing we would do is to tell them that this is a case where the Commonwealth is seeking the death penalty without telling them anything else about the case at all, and individually voir dire them about whether any of them are ultimately opposed to the death penalty.
>
> DEFENSE COUNSEL: So then, we would have a death-qualified jury when we begin the rest?
>
> THE COURT: That's right.

No rehabilitation of jurors on death penalty questions would be permitted (TE 3-1-82, 17-18, 31; App. 73-74, 77).

On the day of trial, the court ruled that the only question it would ask concerning the jurors' qualifications to participate in a capital case was the following (TE I, 38; App. 84):

> Do you have any personal conviction against imposing the death penalty, such that you could not consider it under the circumstances in this or in any other case and regardless of what the evidence may be?[4]

Defense counsel tendered written questions which he wanted the court to ask prospective jurors on the question of capital punishment (TE I, 39; App. 85; TR 82CR0406, 210-215; App. 78-83). The trial court overruled the tendered questions (TE I, 39-44; App. 85-90) and counsel objected to the ruling that no rehabilitation would be permitted when the jurors were asked the aforementioned question (TE 3-1-82, 17-18, 31; TE I, 63; App. 73-74, 77, 91). The court also stated, "I intend to make it my ruling that I am going to ask all of the individual voir dire questions of the Jury." (TE I, 38; App. 84). Subsequently, defense counsel stated "we have tendered proposed questions to the capital phase which I take it are overruled?" The court responded, "Yeah." (TE I, 39; App. 85).

On direct appeal, the petitioner argued that the undue restriction on voir dire examination violated the 6th, 8th and 14th Amendments. (Appellant's Brief, Argument III, pp. 24-41). The Kentucky Supreme Court rejected the petitioner's argument on the basis that it did not view the trial court's ruling as precluding defense counsel from asking the tendered questions concerning the death

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3. In conformance with Kentucky practice in death penalty cases, the Kentucky Supreme Court in its opinion stated that "all prejudicial errors 'must be considered, whether or not an objection was made in the trial court.' Therefore, this opinion . . . will not disregard a claim of error for lack of objection unless it is apparent that the failure to object was a deliberate trial tactic." Stanford v. Commonwealth, 734 S.W.2d at 783. (App. 10). See also Ice v. Commonwealth, Ky., 667 S.W.2d 671, 672 (1984); KRS 532.075(2): "The Supreme Court shall consider the punishment [in capital cases] as well as errors enunciated by way of appeal."

4. The court essentially adhered to that form of the question during the portion of the voir dire examination dealing with the jurors' qualifications to serve on a capital case although the words "conscientious scruples" were used in lieu of "personal conviction" (TE I, 65-148; TE II, 151-207).

penalty during the general questioning phase of the voir dire examination. Stanford v. Commonwealth, 734 S.W.2d at 785-786; App. 16-17. In his petition for rehearing, the petitioner argued that the Kentucky Supreme Court, in effect, created an exception to its own rule that attorneys must comply with orders and rulings of the court. See Leibson v. Taylor, Ky., 721 S.W.2d 690, 692 (1986). The petitioner argued that, under traditional rules governing Kentucky procedure on preservation of error, when the trial court indicated it was not going to let defense counsel ask the tendered questions during the individual voir dire examination on the issue of the death penalty, counsel was required to accede to the ruling and not attempt to ask those questions in another phase of the proceedings. Citing Henry v. Mississippi, 379 U.S. 443 (1965), the petitioner argued that the Kentucky Supreme Court created a new rule of error preservation which did not serve any legitimate state interest and contravened well-established principles governing preservation of error in Kentucky. The petitioner asserted that the implementation of this new rule of procedure violated his 6th, 8th and 14th Amendment rights. (Petitioner's Petition for Rehearing, filed 7-10-87, pp. 1-4).

Question II - A pre-trial motion was filed requesting that the petitioner be given a separate trial from that of the co-defendant, David Buchanan. (TR 81CR1218, 198-200; App. 50-52). The petitioner argued that he would be unable to cross-examine Buchanan concerning a statement he made implicating the petitioner. He also argued that the rule of Bruton v. United States, 391 U.S. 123 (1968) would not adequately protect his rights. The motion was overruled. (TE Hrng. 3-1-82, 184-186; App. 53-55). The motion for a separate trial was renewed following the trial court's ruling which excluded the death penalty for the co-defendant. (TR 82CR0406, 207-209; App. 56-58).5 The motion was again overruled. (TE I 34; App. 59). On

5. Buchanan's motion was premised on Enmund v. Florida, 458 U.S. 782 (1982). (TR 82CR0406, 164-170). However, no hearing was conducted on the motion and the trial court did not make any specific findings of fact or conclusions of law that the death penalty was an unconstitutional sentence to impose on Buchanan because he fell squarely within the parameters of Enmund. See Buchanan v. Kentucky, ___ U.S. at _____, 107 S.Ct. at 2110.

direct appeal the petitioner argued that the failure to grant him a separate trial from that of the co-defendant violated the rights guaranteed him by the 6th, 8th and 14th Amendments. (Appellant's Brief, Argument VIII, pp. 61-74).

Question III - During the penalty phase of the petitioner's capital trial, the defense offered the testimony of Robert Jones as mitigating evidence. The prosecution objected to Jones' testimony. (TE X, 1483-1486; App. 110-113). By a procedure known as an avowal, the testimony of Mr. Jones was presented to the trial court, outside the presence of the jury, for the trial court's consideration and for review by an appellate court. (TE X, 1485-1497; App. 112-124).6 Upon completion of the avowal, the prosecution's objection was sustained and Jones was not permitted to give any testimony in the presence of the jury. (TE X, 1498-1500; App. 125-127). On direct appeal, the petitioner argued that the exclusion of Jones' testimony violated the 8th and 14th Amendments. (Appellant's Brief, Argument XVIII, pp. 157-162).

Question IV - During the penalty phase, defense counsel tendered instructions which advised the jury that the petitioner's exercise of his right not to testify could not be used as an inference of guilt and should not prejudice him in any way. (App. 61, 66). The instructions were tendered in conformance with the Kentucky Rule of Criminal Procedure (RCr) 9.54(2).7 On direct appeal, the petitioner argued that the trial court's failure to give a "no adverse inference" instruction violated the 5th and 14th Amendments. (Appellant's Brief, Argument XXXII, pp. 235-238.

6. The version of RCr 9.54(2) which was in effect at the time of the petitioner's trial provided that an issue with respect to the instructions could be preserved for appellate review "by an offered instruction or by motion or [by making an] objection before the court instructs the jury, stating specifically the matter to which [the party] objects and the . . . grounds of his objection." App. 1A.

7. An avowal is a procedure authorized by Kentucky Rule of Criminal Procedure (RCr) 9.52 which allows a party to place in the record evidence ruled inadmissible by the trial court. The evidence is presented outside the presence of the jury and an appellate court is thereby able to review the trial court's ruling excluding the evidence. App. 1A.

Question V - During the penalty phase, the petitioner requested that the jury be instructed "that even if you believe that the aggravating circumstances alleged have been proved beyond a reasonable doubt, you may still nevertheless in your discretion recommend a sentence other than death. A finding that the aggravating factors do exist does not mean that you must give the death penalty to Kevin N. Stanford." (App. 60-61). The petitioner also requested that the jury be instructed: "Even if you believe the aggravating circumstances exist beyond a reasonable doubt, you are not bound to return a finding of death." (App. 66). On direct appeal, the petitioner argued that the failure to give the aforementioned instructions violated the 8th and 14th Amendments. (Appellant's Brief, Argument XXVI, pp. 213-217).

Question VI - The petitioner filed a pre-trial motions to suppress his statement to police officers and to suppress all the fruits derived therefrom. (TR 81CR1218, 143-150; App. 92-99). Following a hearing on the motion, the trial court ruled that the petitioner's arrest was legal but that his statement was obtained in violation of Edwards v. Arizona, 451 U.S. 477 (1981) and the right to counsel. (TR 82CR0406, 111-115; App. 100-104). The trial court also ruled that the fruits (as categorized by defense counsel) derived from the petitioner's statement were admissible. (TR 82CR0406, 115-118; App. 104-107). On direct appeal, the petitioner argued that his arrest was illegal because it lacked probable cause and that evidence was admitted at his trial in violation of the 4th, 5th, 6th and 14th Amendments. (Appellant's Brief, Argument XVII, pp. 123-156).

Question VII - During trial, the petitioner objected to any testimony by Detective Hall about a statement made to him by David Buchanan. (TE IV, 482; App. 45). The petitioner was concerned that the jury would identify him as "the other person" even if his name was redacted from the statement. (TE IV, 482-483; App. 45-46). The objectionlwas overruled but the court cautioned Hall not to mention the petitioner by name. (TE IV, 482-483; App. 45-46). On direct appeal, the petitioner argued that the 6th and 14th Amendments were violated by the admission of the non-testifying co-defendant's statement into evidence. (Appellant's Brief, Argument IX, pp. 74-80).

Question VIII - The petitioner filed a pre-trial motion and argued that imposition of the death penalty on the petitioner, who was 17 years old at the time of the alleged crimes, constituted cruel and unusual punishment in violation of the 8th and 14th Amendments. (TR 81CR1218, 210-212; App. 128-130). The motion was overruled. (TE 3-1-82, 80; App. 131). The motion was renewed immediately prior to trial and was again overruled. (TE I, 35; App. 132). On direct appeal, the petitioner argued that imposition of the death penalty on juveniles violated the 8th and 14th Amendments. (Appellant's Brief, Argument XXI, pp. 177-188).

I. THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED WHEN A STATE APPELLATE COURT, IN A CAPITAL CASE, ADOPTS A NEW RULE OF ERROR PRESERVATION THAT ADVANCES NO LEGITIMATE STATE INTEREST AND CONSTITUTES A SUBSTANTIAL DEPARTURE FROM PREVIOUSLY WELL-ESTABLISHED RULES GOVERNING PRESERVATION OF ERROR.

APPLICATION OF THIS NEW RULE OF ERROR PRESERVATION TO THE PETITIONER'S CASE VIOLATES DUE PROCESS OF LAW.

This Court has often considered the question of whether State laws or rules of procedure could limit or supersede the exercise of a federal constitutional right by the accused in a criminal case.8 This case provides the Court with an opportunity to balance State interests in proper preservation of error on the issue of voir dire examination of jurors in a capital case against the interests of accused to meaningfully exercise his right to trial by a fair and impartial jury and be safeguarded from arbitrary imposition of the death penalty that would result from the seating of jurors who were not constitutionally qualified for service in a capital case.

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8. See for example, Chambers v. Mississippi, 410 U.S. 284 (1973); Henry v. Mississippi, 379 U.S. 443 (1965); Davis v. Alaska, 415 U.S. 308 (1974); Douglas v. Alabama, 380 U.S. 415 (1965); Davis v. Wechsler, 263 U.S. 22 (1923); Douglas v. California, 372 U.S. 353 (1963); Duncan v. Louisiana, 391 U.S. 145 (1968); Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972); Brooks v. Tennessee, 406 U.S. 605 (1972); California v. Green, 399 U.S. 149 (1970); Dutton v. Evans, 400 U.S. 74 (1970); James v. Kentucky, 466 U.S. 341 (1984); Carter v. Kentucky, 450 U.S. 288 (1981); Crane v. Kentucky, 476 U.S. ___, 106 S.Ct. 2142 (1986); Ewitts v. Lucey, 469 U.S. 387 (1985); Griffin v. Illinois, 351 U.S. 12 (1956); Ohio v. Roberts, 448 U.S. 56 (1980); Gerstein v. Pugh, 420 U.S. 103 (1975); Washington v. Texas, 388 U.S. 14 (1967); and Taylor v. Louisiana, 419 U.S. 522 (1975).

As noted in the Statement of the Case (pp. 4-6), the trial court asked only one question during the individual voir dire examination to determine the qualifications of the prospective jurors to participate in a capital case. (TE 3-1-82, 10-12; App. 70-72). The court indicated that the jury would be "death-qualified" at the completion of the individual voir dire examination and prior to the commencement of the general voir dire examination. (TE 3-1-82, 22-23).[9] Defense counsel tendered a list of questions concerning capital punishment and pre-trial publicity which he wanted the court to ask. (TE I, 39; TR 82CR0406, 201-215; App. 78-85). Prior to the commencement of the voir dire examination, defense counsel stated "We have tendered proposed questions to the capital phase which I take it are overruled?" The court responded, "Yeah." (TE I, 39; App. 85).[10]

The Kentucky Supreme Court recognized a defendant's right to ask the questions listed in n. 10 in order to "life-qualify" the jury, i.e. determine whether the jurors would automatically impose the death penalty regardless of the circumstances of a particular case. Stanford v. Commonwealth, 734 S.W.2d at 786. (App. 17). However, the Kentucky Supreme Court did not view the trial court's ruling as preventing defense counsel from asking "life-qualifying" questions.

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9. The jurors were questioned individually regarding the issues of capital punishment and pre-trial publicity. (TE 3-1-82, 19; TE I, 50-54, 59-60). The individual voir dire examination can be found at TE I, 65; TE II, 267). The general voir dire examination began at TE II, 271 and was completed at TE III, 322.

10. Included in the list of questions which defense counsel sought to ask were several questions which sought to determine if prospective jurors would automatically vote for the imposition of the death penalty if the petitioner was convicted of murder. (TR 82CR0406, 210-212 [Questions 1-4, 11 and 16]; App. 78-80). On direct appeal the petitioner maintained that he was constitutionally entitled to ask the foregoing questions because a juror who would automatically vote in favor of the death penalty regardless of the circumstances of the individual case would be unqualified for service in a capital case under the doctrine announced in Wainwright v. Witt, 469 U.S. 412 (1985). Several courts have determined that jurors who would automatically vote the death penalty regardless of the circumstances were unqualified for service in a capital case. See Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981); Pierce v. State, Tex. Cr. App., 604 S.W.2d 185 (1980); Hance v. Zant, 696 F.2d 940 (11th Cir. 1983). [Appellant's Brief, Argument III, pp. 26-30]. The importance of the issue presented by whether a juror can be struck for cause because he would automatically vote for the death penalty is reflected in the fact that this Court has granted certiorari in Ross v. Oklahoma, (No. 86-5309), ___ U.S. ____, 81 Cr. L. Rptr. 4071 (6-15-87).

Indeed, the court imposed an affirmative duty on defense counsel to ask those questions in the general voir dire examination in spite of the trial court's ruling. Id. at 876; App. 17.

This conclusion contradicts the court's ruling that it would "not disregard a claim of error for lack of objection unless it is apparent that the failure to object was a deliberate trial tactic." Id. 734 S.W.2d at 783; App. 10. It is obvious that the Kentucky Supreme Court has not construed defense counsel's failure to ask the tendered questions as a "deliberate trial tactic". Indeed, it would be ludicrous to suggest that any competent attorney would, as a matter of trial strategy, fail to ask the tendered questions which bore directly on the jurors' qualifications to serve in a capital case. As noted above and on pp. 4-6 of the Statement of the Case, the trial judge made unmistakably clear that he had overruled defense counsel's tendered questions. (TE I, 39; App. 85). Yet, the effect of the rule enunciated by the Kentucky Supreme Court is to require trial attorneys to run the risk of contempt in order to preserve an error for appellate review. The rule announced herein constitutes a substantial departure from well-established rules of procedure governing preservation of error in Kentucky and advances no legitimate state interest.

Kentucky has never required that an attorney continually press the trial court to grant a particular motion or form of relief when the court has made a ruling on that subject matter. When the trial court overrules an objection to a question that is asked of a witness, no requirement is imposed on counsel to continue to object to the same line of questioning. Bailey v. Bailey, 297 Ky. 400, 180 S.W.2d 316, 319 (1944). See also Louisville and N.R.Co. v. Rowland's Adm'r., 215 Ky. 665, 286 S.W. 929, 930 (1926). The same rationale is equally applicable to the case at bar. Indeed, the Kentucky Supreme Court has recently reiterated counsel's duty to follow and obey the orders and rulings of the Court. Leibson v. Taylor, Ky., 690 S.W.2d 721 (1985). That is precisely what defense counsel did in this case. He asked for a ruling concerning the tendered questions on the issue of capital punishment, was advised that he was overruled on that point

and, respecting the ruling of the court, complied with it. Now, the Kentucky Supreme Court has enunciated a rule that equates adherence to a ruling of the trial court with waiver of an issue for appellate review. Imposition of the death penalty is fundamentally unfair and arbitrary when it is predicated on a forfeiture of a right to present a legal issue on appeal because a trial attorney, relying on well-established rules of procedure, adheres to a trial court's ruling and conforms his conduct accordingly.

In Henry v. Mississippi, 379 U.S. 443, 447 (1965), it was held that "a litigant's procedural default in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." The rule enunciated by the Kentucky Supreme Court herein serves absolutely no legitimate state interest and will engender inconsistent results because it offers no guidance as to whether an attorney can rely on a ruling of the trial court or whether he must repeatedly seek to do what the trial judge has forbidden in order to preserve the legal issue for appellate review. Such a rule does not promote the orderly administration of justice. Its strains credulity to conclude, as the Kentucky Supreme Court has done, that the trial court's ruling in the case at bar pertained only to the individual voir dire examination. Any reasonable attorney would interpret the trial court's ruling as an absolute ban on the ability to ask the tendered questions. Given the unequivocal nature of the trial court's ruling, defense counsel had an absolute duty to comply with it and to expect that his compliance would not result in a waiver of error on appeal. A rule that permits such an absurd result is so lacking due process and fundamental fairness that it renders imposition of the death penalty arbitrary.

This case also presents the question of whether application of the new rule of error preservation to the petitioner denied him due process of law. This is not the first time in which Kentucky litigants have not received the benefit of case precedent which was

overruled on their direct appeals.[11] Thus, it is obvious that lower courts need this Court's guidance on whether litigants whose direct appeals result in the overruling of prior cases, laws or rules of procedure should be given the benefit of the former law, especially where there is a "clear break" with former law. See Griffith v. Kentucky, ___ U.S. ____, 107 S.Ct. 708 (1987).

II. THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THAT A DEFENDANT FOR WHOM THE PROSECUTION IS SEEKING THE DEATH PENALTY BE GIVEN A SEPARATE TRIAL FROM A CO-DEFENDANT FOR WHOM THE PROSECUTION IS SEEKING A MAXIMUM SENTENCE OF LIFE IMPRISONMENT.

The issue presented in the petitioner's case is different from that addressed in Buchanan v. Kentucky, ___ U.S. ___, 107 S.Ct. 2906 (1987) and Lockhart v. McCree, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). Certiorari should be granted because the petitioner's case demonstrates the weakness in the "residual doubt" justification for a joint trial articulated in Buchanan and Lockhart and thus provides the Court an opportunity to eliminate another arbitrary factor that may lead to an unconstitutional imposition of the death penalty.

The jury's function was not only to decide guilt or innocence but was also to impose a penalty. With only the petitioner facing the death penalty at the outset of the trial, it is likely that jurors would assume that his culpability was significantly greater than that of the co-defendant. In effect, the petitioner's status as the person who did the actual shooting was pre-ordained. Indeed, the opening statements of the prosecution and the co-defendant left no doubt that they would seek to prove that the petitioner was the acutal killer and therefore deserving of the death penalty. (TE III, 340, 344-345). The refusal to grant the petitioner a separate trial from the co-defendant constituted a substantial encroachment upon the

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11. See Murphy v. Commonwealth, Ky., 652 S.W.2d 69 (1983) cert. denied Murphy v. Kentucky, 465 U.S. 1072 (1984), affirmed Murphy v. Sowders, 801 F.2d 205 (6th Cir. 1986) cert. denied Murphy v. Sowders, ___ U.S. ____, 107 S.Ct. 1593 (1987); Dale v. Commonwealth, 715 S.W.2d 227 (1986) cert. denied Dale v. Kentucky, ___ U.S. ____, 107 S.Ct. 1026 (1987); Morgan v. Commonwealth, Ky., 730 S.W.2d 935 (1987).

fact-finding function of the jury especially in light of the fact that there was no pre-trial evidentiary determination to justify the different sentences being sought for the petitioner and the co-defendant. Under these circumstances, the presumption of innocence is virtually nullified[12] and the failure to grant a separate trial becomes a denial of due process.[13]

Moreover, the instructions were merely a written confirmation of the pre-trial determination that the punishments of the petitioner and the co-defendant should be vastly different. (TR 82CR0406, 228, 250; App. 144-145). The fact that the jury was instructed that it could convict Buchanan of all lesser included homicide offenses, when there was no evidentiary basis supporting such instructions, further prejudiced the petitioner and gave substantial credence to the notion that the pre-determined distinction in the level of culpability between the petitioner and the co-defendant was approved by the court.

Although the prosecutor urged the jury in his closing argument not to convict Buchanan of intentional murder because the evidence indicated that the petitioner did the actual shooting, the jury rejected that plea and, in fact, convicted Buchanan of intentional murder. (TR 82CR0406, 269; TE IX, 1332, 1336). Thus, it is readily apparent that the factual distinction between the culpability of the petitioner and the co-defendant was not as clear-cut as the pre-trial ruling would have indicated.

Moreover, there was objective and independent evidence to establish that the petitioner was not the actual shooter as indicated by the testifying co-defendant (Troy Johnson, TE VII, 1040-1041) and the non-testifying co-defendant (David Buchanan, TE IV, 484-486; App. 47-49).

Two women drove upon the crime scene at the moment the shots were fired. Two black men walked past their car and a third man was in a nearby car. Neither of the women identified the petitioner as

12. Cf. Estelle v. Williams, 425 U.S. 501 (1976).

13. Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970); Alvarez v. Wainwright, 601 F.2d 845 (5th Cir. 1979).

being either of the men who walked past their car. (TE IX, 954-972, 983-992). The women identified David Buchanan's uncle, Calvin, as being one of the men that passed their car. (TE IV, 536; TE IX, 972, 991).

Johnson's testimony that the petitioner was supposed to have fired the shots from the driver's side of the victim's car is also refuted by the testimony of the state firearm's examiner who stated that scientific testing disclosed a positive reaction for firearms residue around the area of the dome light in the interior of the victim's car. (TE VI, 754-755, 760-761, 770-771; TE VII, 1037-1039, 1049; TE IV, 576-578, 581).

Moreover, the position of the victim's body and the location of the gunshot wounds are not consistent with the testimony that the shots were fired from the driver's side of the car. The victim was found face down in the rear seat of her car. Her head was on the driver's side of the car. (TE III, 400-401; TE IV, 576-579). She sustained a non-fatal gunshot wound to the left side of the mouth and also sustained a lethal gunshot wound to the right side of the head in the vicinity of the ear. (TE III, 366-368, 372). The position of the victim's body would indicate that the first shot fired had to have been a non-fatal wound to the left side of the face. That shot would have caused her head and body to spin to the right and back of the car and be pushed toward the driver's side of the car. Since only one gun was alleged to have been involved and one individual was alleged to have fired the shots, the position of the victim's body indicates that the fatal shot could not have been fired from the driver's side of the car where the petitioner was supposed to have been standing.

Insofar as the evidence raises a substantial question about whether the petitioner was the actual shooter, the case at bar underscores the inherent weakness in the "residual doubt" justification for a joint trial between a capital and non-capital defendant. Buchanan v. Kentucky, ___ U.S. at ___, 107 S.Ct. at 2915; Lockhart v. McCree, 476 U.S. at ____, 106 S.Ct. at 1769. Under the circumstances, it is obvious that the petitioner did not derive any "benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase." Lockhart, 106 S.Ct.

at 1769. Furthermore, the joint trial caused the prosecution to reap an unwarranted benefit from the statement of the non-testifying co-defendant. It is likely that the jury would use Buchanan's statement as corroboration of Troy Johnson's trial testimony. Thus, the joint trial had the effect of attributing a measure of reliability to Buchanan's statement that was not supported by the evidence. Such an anomalous result contravenes the presumed unrealiability of a non-testifying co-defendant's statement. Lee v. Illinois, 476 U.S. ___, ___, 106 S.Ct. 2056, 2061, 90 L.Ed.2d 2514 (1986). The prejudice to the petitioner is significantly enhanced because the record of the case at bar does not reflect that the trial court ever instructed the jury that Buchanan's statement could not be used as evidence against the petitioner. (See Argument VII).

Accordingly, the petitioner prays that the Court grant him a writ of certiorari to decide the question of whether there are ever any circumstances under which the 6th, 8th, and 14th Amendments require that a defendant against whom the death penalty is being sought be given a separate trial from a co-defendant for whom the maximum sentence is a term of imprisonment.

III. THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY EXCLUDING, DURING THE PENALTY PHASE OF A CAPITAL CASE, MITIGATING EVIDENCE PRESENTED BY A FORMER DEATH ROW INMATE WHO WORKED AS A JUVENILE COUNSELOR AND COULD OFFER TESTIMONY NOT ONLY ABOUT HIS PERSONAL EXPERIENCE WITH THE PETITIONER PRIOR AND SUBSEQUENT TO THE ALLEGED CRIMES BUT WHO COULD ALSO TESTIFY ABOUT THE REHABILITATIVE PROGRAMS OFFERED WITHIN THE ADULT PENAL SYSTEM.

The Kentucky Supreme Court ruled that the trial court properly excluded mitigating evidence offered by Robert Jones during the penalty phase of the petitioner's trial. Stanford v. Commonwealth, Ky., 734 S.W.2d at 788-790; App. 24-28. In reaching that conclusion, the Kentucky Supreme Court has imposed arbitrary limitations on the presentation of mitigating evidence during the penalty phase of a capital case. The case at bar reflects the need for further guidance from this Court on the issue of what, if any, restrictions can be constitutionally imposed on the introduction of mitigating evidence in a death penalty case.

Out of the presence of the jury, Jones testified that he was the supervisor for the Mayor's Summer Youth Program. He had also been assistant director of the Juvenile Crime Program at the Urban House and a counselor for the purpose of inmate grievances at the Jefferson County Jail. (TE X, 1488; App. 115). Jones also testified that he had been a death row inmate and had previously testified in a capital case as to the inappropriateness of the death penalty in that particular case. (TE X, 1489-1490; App. 116-117).

While working as a youth counselor at the Children's Detention Center in 1978 and 1979, he became familiar with the petitioner. Jones testified that he also spoke with the petitioner about a month prior to his trial. (TE X 1490-1491; App. 117-118). Jones expressed his belief that the petitioner could be rehabilitated and, based on his previous work and his most recent contact with the petitioner, believed that he could benefit from the educational and vocational opportunities offered within the adult correctional system. (TE X, 1491-1495; App. 118-122). The trial court excluded Jones' testimony in its entirety. (TE X, 1498-1500; App. 125-127).

The Kentucky Supreme Court characterized Jones' testimony as "clearly inadmissible" because "He had no academic or professional qualifications to allow him to offer opinion evidence. His personal knowledge of [the petitioner] was at best minimal and remote. That very little of his testimony which might conceivably be admissible, such as the rehabilitative prospects of the defendant, was cumulative." Stanford v. Commonwealth, 734 S.W.2d at 790; App. 27. This rationale not only imposes an arbitrary limitation on the presentation of mitigating evidence in a capital trial and is inconsistent with this Court's decisions on the subject.[14] The capital punishment statutes of Georgia, Florida and Texas passed constitutional muster, in part because they did not impose any limitations on the admissibility of mitigating evidence. Lockett v. Ohio, 438 U.S. at 606-608.

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14. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. 1821 (1987).

The Kentucky Supreme Court's ruling in the petitioner's case has carved an arbitrary exception into the constitutional principle that requires all mitigating evidence to be submitted to and considered by the sentencing body. In this case, Jones offered evidence from a very unique perspective that was not shared by any other mitigation witness. Jones, as a former death row inmate, could testify from first-hand experience about the security, rehabilitative, educational and vocational opportunities offered by the adult penal system. Jones was able to relate that testimony directly to the petitioner with whom he had contact as a youth counselor prior and subsequent to the alleged crimes.

Jones' testimony cannot be excluded simply because "he holds no academic or professional credentials." Stanford v. Commonwealth, 734 S.W.2d at 879; App. 24. If mitigating evidence could be excluded on that basis, then it could be reasoned that witnesses who lacked such "credentials", such as family members, friends and acquaintances, would not be permitted to give mitigating evidence in the penalty phase of a capital case. Such a result is patently unconstitutional in light of Lockett and its progeny. Moreover, expertise "can be acquired by acquaintance with, or observation of, the subject matter." Lee v. Butler, Ky. App., 605 S.W.2d 20, 21 (1979). "A witness may become qualified [as an expert] by practice or an acquaintance with the subject. He may possess the requisite skill by a reason of actual experience or long observation." Kentucky Power Co. v. Kilbourn, Ky., 307 S.W.2d 9, 12 (1957). Jones surely falls within the parameters of those definitions.

The Kentucky Supreme Court also justified the exclusion of Jones' testimony by characterizing his knowledge of the petitioner as "minimal and remote". Stanford v. Commonwealth, 734 S.W.2d at 790; App. 27. This Court's decisions do not suggest that these are justifiable criteria upon which to exclude mitigating evidence. Even an individual who possesses "minimal" knowledge of an accused's character or record, can undoubtedly offer relevant mitigating evidence in the penalty phase of a capital trial. A witness may testify to an unusual act of heroism or kindness by the accused and even if that individual's contact with the accused in that

one instance lasts no more than a few seconds or minutes, it may well constitute the type of evidence that a jury would take into its sentencing decision.

Similarly, remoteness is an inherently unjustifiable basis upon which to exclude mitigating evidence. If such a rule were to apply, then evidence as to the accused's upbringing and childhood would be excluded as being remote to the time when he is on trial as an adult. It is a matter of common knowledge that when an individual experiences a child ultimately shapes his life as an adult. See Eddings v. Oklahoma, 455 U.S. at 115-116.

The Kentucky Supreme Court has imposed arbitrary restrictions on the introduction of mitigating evidence in a death penalty trial and has created exceptions to the rule governing the admissibility of mitigating evidence which find no support in the decisions of this Court and, indeed, conflicts with those decisions. Therefore, the petitioner prays that this Court grant a writ of certiorari to resolve the issue of whether the Kentucky Supreme Court has articulated any constitutionally acceptable grounds for excluding mitigating evidence in a death penalty case.

IV. THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRE THAT A JURY BE INSTRUCTED IN THE PENALTY PHASE OF A CAPITAL CASE THAT THE ACCUSED IS NOT REQUIRED TO TESTIFY AND THAT NO ADVERSE INFERENCE CAN BE DRAWN FROM HIS SILENCE.

The accused, in the guilt-innocence phase of a criminal trial, is constitutionally entitled to an instruction which articulates the 5th Amendment right and further instructs the jury that no adverse inference can be drawn from the exercise of that right. Carter v. Kentucky, 450 U.S. 288 (1981) This Court has not addressed the question of whether such an instruction is constitutionally required to be given in the penalty phase of a capital case.

The constitutional right to remain silent does not end with the jury finding the accused guilty in the guilt-innocence phase of the trial. See, Estelle v. Smith, 451 U.S. 454 (1981). A guilty verdict does not diminish the importance of giving a "no adverse inference" instruction during the penalty phase of a capital case.

Indeed, for purposes of such an instruction, no distinction can be drawn between the guilt-innocence and penalty phases of a trial. See, Finney v. Rothgerber, 751 F.2d 858 (6th Cir. 1985).

In People v. Ramirez, Ill., 457 N.E.2d 31 (1983), it was held to be reversible error not to have instructed the jury, in the penalty phase of a capital trial, that it could draw no adverse inference from the accused's decision to exercise his constitutional right to remain silent. See also Brown v. State, Tex. Crim. App., 617 S.W.2d 234, 238 (1981); and Moss v. State, Tex. Crim. App., 632 S.W.2d 344 (1982).

The importance of a "no adverse inference" instruction in the guilt-innocence phase of a criminal trial was clearly recognized in Carter v. Kentucky, supra. Surely, the accused is entitled to the same constitutional safeguards in the penalty phase of his trial when the jury is being asked to decide whether he should live or die. The need for a "no adverse inference" instruction is perhaps even more compelling in the penalty phase because a juror may reasonably assume that a defendant who is requesting the jury to spare his life would testify and offer reasons in the penalty phase why the death sentence should not be imposed on him.

Accordingly, the Court should grant certiorari to resolve the important constitutional question of whether the 5th and 14th Amendments require that a "no adverse inference" instruction be given during the penalty phase of a capital case.

V. THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THAT THE JURY BE INSTRUCTED DURING THE PENALTY PHASE OF A CAPITAL CASE THAT THE DEATH SENTENCE NEED NOT BE IMPOSED EVEN IF AN AGGRAVATING CIRCUMSTANCE IS PROVED BEYOND A REASONABLE DOUBT.

This Court should grant a writ of certiorari to determine if the 8th and 14th Amendments require a specific instruction that the jury can impose a sentence of imprisonment even if the aggravating circumstances are proved beyond a reasonable doubt. (App. 60-61). The trial court's instruction did not specifically instruct on this

matter. (TR 82CR0406, 311; TE XI, 1507; App. 139).[15] The instruction requested by the petitioner (App. 60-61) advances the objective of eliminating arbitrary imposition of the death penalty; ensures that the jury completely understands all of the sentencing options; and dispels the notion that the finding of an aggravating circumstance automatically requires imposition of the death penalty.

The constitutional requirement to consider mitigating evidence[16] is meaningless if the jury is not clearly made aware of all the available sentencing options, including the option of not imposing the death penalty notwithstanding the existence of an aggravating circumstance. In State v. Tyner, 258 S.E.2d 559, 566 (S.C. 1979), the court held that the failure to instruct the jury that it could recommend life imprisonment even if it found the existence of one or more aggravating circumstances beyond a reasonable doubt was an "arbitrary factor" requiring reversal of the death penalty. See also State v. Goolsby, 268 S.E.2d 31, 40-41 (S.C. 1980); Zant v. Gaddis, 279 S.E.2d 219, 222 (Ga. 1981); See Fleming v. State, 240 S.E.2d 37 (Ga. 1977); State v. Woomer, 284 S.E.2d 357 (S.C. 1981); Stynchcombe v. Floyd, 252 Ga. 113, 311 S.E.2d 828 (1984). It has been held that such an instruction is constitutionally required. See Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978); Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981) cert. denied 458 U.S. 1111 (1982); Goodwin v. Balkcom, 684 F.2d 801-802 (11th Cir. 1982).

If jurors who would automatically vote to impose the death penalty regardless of the circumstances would be unqualified for jury service,[17] then an instruction advising the jury that it can impose a sentence of less than death notwithstanding the existence of an

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15. The jury was instructed that a prison sentence could be imposed if there were more aggravating than mitigating circumstances or if no mitigating circumstances existed. (TR 82CR0406, 311; TE XI, 1507; App. 139).

16. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. ____, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Hitchcock v. Dugger, ____ U.S. ____, 107 S.Ct. 1821 (1987).

17. See Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981); Wainwright v. Witt, 469 U.S. 412 (1985). This precise issue is presently pending before the Court. See Ross v. Oklahoma, (No. 86-5309), ____ U.S. ____, 41 Cr. L. Rptr. 4071, cert. granted (6-15-87).

aggravating circumstance, would undeniably prevent jurors from automatically imposing the death penalty simply because an aggravating circumstance is found to exist. The instruction would have the effect of safeguarding defendants in capital cases from mandatory or automatic imposition of a death sentence. The requirement for the instruction tendered by the petitioner is therefore rooted in the constitutional principle rejecting mandatory death sentences.18

It is hardly an abstract proposition that jurors may have believed that the finding of an aggravating circumstance required imposition of the death penalty on the petitioner. Indeed, the verdict forms may have contributed to such a perception on the part of the jurors. (The verdict forms can be found at App. 142; TR 82CR0406, 314).

By providing a space in which the jury was required to write out the aggravating circumstances it found after the spaces provided for recommending sentences of imprisonment, the verdict forms, in effect, can reasonably be read as requiring the jury to sentence the petitioner to death if the aggravating circumstances were found beyond a reasonable doubt. The possibility of such arbitrariness would have been eliminated had the jury been specifically instructed that the petitioner could have been sentenced to a term of imprisonment notwithstanding the existence of the aggravating circumstances. Accordingly, a writ of certiorari should be granted.

VI. WHEN THE ACCUSED'S INCRIMINATING STATEMENT IS SUPPRESSED BECAUSE IT IS OBTAINED IN VIOLATION OF THE RULE ENUNCIATED IN EDWARDS V. ARIZONA, 451 U.S. 477 (1981) AND/OR THE SIXTH AMENDMENT RIGHT TO COUNSEL, THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS REQUIRE THAT THE DIRECT AND INDIRECT FRUITS OF THAT STATEMENT BE SUPPRESSED AS EVIDENCE.

This case provides the Court with an opportunity to determine if the rationale underlying the exclusionary rule extends to

18. See Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976); Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977); Sumner v. Shuman, ___ U.S. ___, 107 S.Ct. 2716 (1987).

the type of Fifth Amendment violation articulated in Edwards v. Arizona so as to require the suppression of the direct and indirect fruits of the illegally obtained statement of the accused. The Court has not addressed the precise question presented by this case.19

In Michigan v. Tucker, 417 U.S. 433, 447 (1974) it was recognized that the rationale underlying the exclusionary rule "would seem applicable to the Fifth Amendment context as well." However, not only did the salient facts in Tucker occur prior to the decision in Miranda v. Arizona, 384 U.S. 436 (1966) but the petitioner's suppressed statement in this case also led police to the seizure of physical evidence, the discovery of the actual co-defendants and a putative defendant. Since the direct and indirect fruits of unconstitutional police activity must be excluded from evidence.20 The question presented enables the Court to provide guidance in determining what constitutes the indirect fruits of illegal government conduct and how to determine if they are tainted by such conduct.

In its opinion on the suppression issues, the trial court recognized four "fruits" stemming from the petitioner's statement. They included: (1) Calvin Buchanan's arrest, (2) petitioner showing the police where Calvin and David Buchanan (the co-defendant) lived, (3) reference to David Buchanan in the petitioner's statement, and (4) the name of a person identified as Troy. (TR 82CR0406, 115; App. 104). Defense counsel maintained that additional fruits existed, i.e. hair and samples of bodily fluids taken from the petitioner (TR 81CR1218, 148), the telephone conversation between David and Calvin Buchanan which implicated the petitioner, the arrest of the co-defendants, David Buchanan and Troy Johnson, the search of Troy's residence

19. Here, the trial court relied on Edwards v. Arizona as the basis for suppressing the petitioner's statement. (TR 82CR0406, 114-115; App. 103-104). The trial judge also seemed to rely on the right to counsel as a ground for his ruling. (TR 114; App. 103). On direct appeal, the petitioner relying on Brewer v. Williams, 430 U.S. 387 (1977) argued that his statement was obtained as a result of Fifth and Sixth Amendment violations. (Appellant's Brief, Argument XVII, pp. 139-141). See also Michigan v. Jackson, 475 U.S. ___, 106 S.Ct. 1404 (1986). Accordingly, the petitioner believes that the question presented can be fairly framed with reference to the Fifth Amendment violation identified by Edwards v. Arizona and a violation of the Sixth Amendment right to counsel.

20. Wong Sun v. United States, 371 U.S. 471, 485 (1963).

where a gun and gasoline can which was taken from the service station were found, David Buchanan's statement, photographs taken in the course of searching Troy's residence, the procurement of the search warrant and resulting search of the petitioner's residence, and fingerprints taken from the petitioner. (TE 3-9-82, I, 44-48, 53-56, 108-111; TE Trial IV, 488; TE Trial V, 673; TE Trial VI, 822). The police were only able to solve the crime in this case after the petitioner gave his statement. (TE 3-9-82, I, 58, 73; 3-9-82, II, 231).

The petitioner was arrested on January 13, 1981, between 7:30 p.m. and 7:40 p.m.[21] The petitioner made an incriminating statement in which he implicated Calvin Buchanan and a person named Troy. He showed the police where Calvin and David Buchanan resided and he mentioned David Buchanan by name in his statement although it was in the context of some other crimes. Following the petitioner's arrest and his statement, the police obtained a search warrant and executed it at the petitioner's residence on January 14, 1987 where they found the keys to the service station. (TE 3-9-82, Vol. I, 28-31, 44, 74-81; Vol. II, 200-201, 231-235, 262, 268-269, 284-289,

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21. The petitioner continues to maintain as he did in the trial court and on direct appeal to the Kentucky Supreme Court, that his arrest was illegal and violated the Fourth Amendment. Police officers admitted that they only had rumors that the petitioner was involved in the offenses at the service station. (TE 3-9-82 Vol. I, 16; Vol. II, 220-221). Owen Smyzer was interviewed by police in connection with the stolen cigarettes. He denied any knowledge about them. (TE 3-9-82, Vol. I, 12-13). On the same day, January 12, 1981, Alexis Sloan was also interviewed by police and he likewise denied knowing anything about the incident at the service station. (TE 3-9-82, Vol. II, 264). The petitioner was initially interviewed in connection with the stolen cigarettes and the service station offenses on January 13, 1981. He requested to talk to a lawyer and after talking to him, he was not charged and was allowed to leave police headquarters. (TE 3-9-82, Vol. I, 15-18, 91, 96-102; Vol. II, 186). After the petitioner's release, Smyzer told police that he and Sloan had disposed of the cigarettes for the petitioner. However, Smyzer never claimed to see the petitioner with the cigarettes. (TE 3-9-82, Vol. I, 19-26, 46). On January 13, 1981, Sloan also told the police that he was told by the petitioner that he got some cigarettes from the service station. (TE 3-9-82, Vol. II, 221-230; Vol. III, 302, 317-323; Vol. IV, 475). Since neither Sloan nor Smyzer had been used on previous occasions to supply the police with information (TE 3-9-82, Vol. I, 46; Vol. III, 304; Vol. IV, 483-484) and since there was no indicia of reliability or independent corroboration of Sloan and Smyzer's information, the petitioner maintained that there was insufficient facts to establish probable cause for his arrest. See Taylor v. Alabama, 457 U.S. 687 (1982); and Dunaway v. New York, 442 U.S. 200 (1979). (TR 81CR1218, 143-175; Appellant's Brief, Argument XVII, 124-135).

297-298; Vol. III, 366-371; Vol. IV, 477-480; TR 82CR0406, 115; App. 104.

The police did not have the names of Calvin or David Buchanan or anyone named Troy as suspects in the case prior to the petitioner's statement (TE 3-9-82, Vol. I, 73) which resulted in Calvin's arrest on January 14, 1981. On January 16, while Calvin was in jail, the police made a tape recording of a telephone conversation between Calvin and David Buchanan in which David implicated himself in the service station offenses. David was then arrested on January 16, 1981, and made an oral statement implicating himself, the petitioner, and Troy Johnson. On January 17, 1981, Johnson was arrested and during a search of his residence, a gun, believed to be the murder weapon, and a gas can belonging to the service station were found. Head and pubic hair and saliva and blood samples from the petitioner were also obtained by the police. (TE 3-9-82, Vol. I, 31-42, 46-65; Vol. II, 151-162, 210-211; Vol. III, 374, 380-381; Vol. IV, 492-493; TE Trial IV, 484-486, 567-568; App. 47-49).

As the foregoing facts reflect, the petitioner's statement was the key piece of evidence in solving the crime. The direct and indirect fruits (either physical evidence or live witnesses) flow from the petitioner's statement. Thus, the case at bar enables the Court to give guidance in identifying the causal connection between illegal police conduct and the fruits derived therefrom and determining the extent of the taint of such conduct.

The case at bar also provides the Court with an opportunity to discuss the application of the exclusionary rule to tangible evidence and to the testimony of witnesses. See Parker v. Estelle, 498 F.2d 625 (5th Cir. 1974); Williams v. United States, 382 F.2d 48 (5th Cir. 1967); United States v. Leonardi, 623 F.2d 746 (2nd Cir. 1980); United States ex rel Hudson v. Cannon, 529 F.2d 890 (7th Cir. 1976); United States v. Chamberlin, 609 F.2d 1318 (9th Cir. 1979). See also United States v. Ceccolini, 435 U.S. 268 (1978).

VII. THE SIXTH AND FOURTEENTH AMENDMENTS ARE VIOLATED IN A JOINT TRIAL BY THE ADMISSION OF THE STATEMENT OF A NON-TESTIFYING CO-DEFENDANT WHICH MAKES REFERENCE TO THE PETITIONER AS "THE OTHER PERSON" AND THE JURY IS NOT ADMONISHED THAT THE STATEMENT CANNOT BE USED AS EVIDENCE OF THE PETITIONER'S GUILT.

The record in the case at bar does not reflect that the jury was ever admonished that the co-defendant's statement could not be used as evidence against the petitioner. Moreover, the admission of the non-testifying co-defendant's statement had the anomalous effect of not only corroborating the trial testimony of another co-defendant, when independent evidence raised a substantial question as to the veracity of that testimony (See Argument III) but also constituted evidence of the petitioner's guilt of the sexual offense. In effect, the statement's "presumed unreliability"[22] was overcome by trial testimony of another co-defendant, whose veracity was open to substantial doubt and who could offer no independent evidence of the alleged sexual offense. Certiorari should be granted because the issue presented is an important one that implicates the decisions in Bruton v. United States, 391 U.S. 123 (1968); Lee v. Illinois, 476 U.S. ___, 106 S.Ct. 2056, 90 L.Ed.2d 2514 (1986) and Cruz v. New York, ___ U.S. ___, 107 S.Ct. 1714 (1987).

The co-defendant, David Buchanan, made a statement to a police officer which was admitted into evidence over the objection of the petitioner. (TE IV, 482-483; App. 45-46). The police officer told the jury what Buchanan had told him and he specifically identified Buchanan and the other co-defendant, Troy Johnson, by name. He referred to the third individual as "the other person". (TE IV, 484-486; App. 47-49). Admission of Buchanan's statement not only violated the principles espoused in Cruz v. New York, supra, but also left no doubt in the mind of any juror as to the identity of "the other person" and thereby violated the rule of Marsh v. Richardson, ___ U.S. ___, 107 S.Ct. 1702, 1709 (1987).

Furthermore, the Kentucky Supreme Court applied an outcome determinative test to analyze the effect of the admissibility of

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22. Lee v. Illinois, 476 U.S. at ___, 106 S.Ct. at 2061.

Buchanan's statement. That Court stated that Buchanan's statement "was cumulative and, although not insignificant, it did not have the devastating quality as other direct evidence of [the petitioner's] guilt particularly that of his own extra-judicial admissions, the testimony of Troy Johnson and the physical evidence including his pubic hairs on various parts of the victim's body, and his fingerprints on the car." Stanford v. Commonwealth, 734 S.W.2d at 787-788; App. 21. Such an approach was specifically rejected in in Delaware v. Van Arsdall, 475 U.S. 673, ___ 106 S.Ct. 1431, 1436 (1986). The appropriate inquiry is whether there is any reasonable possibility that the constitutional error contributed to the conviction. Chapman v. California, 386 U.S. 18, 23 (1967); Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963).

The impact of a non-testifying co-defendant's statement is generally so strong that "the ordinarily sound assumption that a jury will be able to follow faithfully its instructions [not to consider the statement as evidence of the defendant's guilt] could not be applied." Lee v. Illinois, 476 U.S. at ____, 106 S.Ct. at 2063. Misuse is likely where, as here, the jury is never instructed on the proper use of a non-testifying co-defendant's statement. Marsh v. Richardson, 107 S.Ct. at 1709. The evidence against the petitioner was not so strong that the admission of Buchanan's statement was harmless as the Kentucky Supreme Court concluded. As noted in Argument II, there is substantial doubt to the veracity of Troy Johnson's testimony that the petitioner did the shooting. Moreover, Buchanan's statement to the police that he and the petitioner took turns "raping and sodomizing" the victim is the only direct evidence of the sexual offenses. (TE IV, 485; App. 48). That statement, of course, does not constitute evidence of the petitioner's guilt. Bruton v. United States, 391 U.S. at 125.

The physical evidence did not support the sodomy charge. Swabs of the victim's mouth and vagina did not indicate the presence of sperm. (TE III, 363, 372). Some head and pubic hair from a black person were recovered from the buttocks area of the victim and various items of clothing. (TE VI, 804-808). However, the serologist

admitted that hair comparisons did not constitute a basis for a positive, personal identification but is only used to corroborate other evidence that connects someone to a crime scene. (TE VI, 826). Saliva and anal swabs taken from the victim indicated the presence of semen, but it was too limited in quantity for blood group (ABO) typing. (TE VI, 808-809). Another anal swab (Exhibit 26G) indicated the presence of semen but since no ABO factors were demonstrated, the serologist concluded that the semen originated from a non-secretor, i.e. a person whose blood type cannot be determined from bodily fluids. (TE VI, 791, 809) The co-defendant, the petitioner and Calvin Buchanan were found to be non-secretors. (TE VI, 817-818). Similarly, the fact that one fingerprint of the petitioner was obtained from the victim's car does not establish the sexual offenses. (TE V, 708; TE VII, 915-917). The statements allegedly made by the petitioner to Corrections Officer Nally are not independently corroborated and therefore should not be construed as evidence of guilt. (TE VIII, 1076-1082; Stanford v. Commonwealth, 734 S.W.2d at 787 n.6; App. 21).

Under all of the circumstances, there is a reasonable possibility that the jury used Buchanan's statement as evidence of the petitioner's guilt. Accordingly, certiorari should be granted to address the important question presented by this case.

VIII. THE IMPOSITION OF THE DEATH PENALTY ON A JUVENILE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This issue was left open by Eddings v. Oklahoma, 455 U.S. 104 (1982) and the Court has granted certiorari on this issue. See Thompson v. Oklahoma, No. 86-6169, cert. granted, ____ U.S. _____, 40 Cr.L.Rptr. 4175 (2-23-87).

The petitioner was 17 years old at the time of the commission of the crimes for which he was convicted. There is a fundamental difference in the treatment of juvenile and adult offenders. See, Application of Gault, 387 U.S. 1 (1967) and Kent v. United States, 383 U.S. 541 (1966). In response, Kentucky has enacted legislation which emphasizes the treatment and rehabilitation of

juvenile offenders. See KRS Chapter 600 and its predecessor Chapter 208. The contrast between juveniles and adults is perhaps best articulated by the recognition "that incorrigibility is inconsistent with youth". Workman v. Commonwealth, Ky., 429 S.W.2d 374, 378 (1968). Emphasis added. In Workman, the court found that a sentence of life without parole for a fourteen (14) year old convicted rapist constituted cruel and unusual punishment and "under all the circumstances shocks the general conscience of society today and is intollerable to fundamental fairness." Id. at 378. Notwithstanding the State's interest in punishing criminal conduct, the court rejected the notion that a juvenile whose case is transferred to a circuit court for treatment as an adult, is so beyond the hope of rehabilitation that execution, without providing the juvenile a chance for rehabilitation within the adult correctional system, is the only appropriate disposition.

The difficult legal question presented by the constitutionality of the death penalty for juveniles is reflected in the diversity of treatment they receive by the various States. Fourteen (14) states and the District of Columbia have a complete ban on capital punishment. (Death Row, U.S.A., Publication of the Legal Defense Fund (8-1-87, p. 1)). Of the thirty-six (36) states permitting capital punishment, ten (10) statutorily prohibit capital punishment for juveniles.[23] Even in states where a juvenile can be executed, court decisions have reduced the punishment to life imprisonment due to the age of the defendant. See State v. Stewart, 250 N.W.2d 849 (Neb. 1977), and State v. Maloney, 464 P.2d 793, 805 (Ariz. 1970).

Indeed, the arbitrariness of the death penalty and its status of cruel and unusual punishment is graphically reflected in the case at bar. The juvenile court in its order transferring

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23. Cal. Penal Code §190.5 [under 18]; Colo. Rev. Stat. Ann. 16-11-103(1)(a) 1987 Supp.; Conn. Gen. Stats. Ann. §52a-46a(f)(1) [under 18]; Ill. Rev. Stats. Ch. 38, §9-1(b) [under 18]; Nev. Rev. Stat. §176.025 [under 16]; N.H. Rev. Stats. 630:1(v) [under 17]; N.M. Stats. Chap. 31, Art. 18-14 [under 18]; Ohio Rev. Code Ann. §2929.02 [under 18]; Tenn. Code Ann. §37-1-134; 39-2-203 (i)(1) [under 18]; Maryland Code Ann. Art. 27, §412.

jurisdiction to the circuit court noted that the petitioner was amenable to treatment and that he had been accepted into an appropriate treatment facility which was located outside of Kentucky. (TR 81CR1218, 30; App. 42). However, the juvenile court ruled that it lacked the "statutory basis to order the state to provide for such institutionalization for the length of time sufficient to provide such intervention reasonably calculated to provide rehabilitation . . .". (TR 81CR1218, 30; App. 42). To condemn to death a juvenile, who is recognized as being amenable to treatment, without any opportunity for rehabilitation within the adult correctional system constitutes cruel and unusual punishment.[24]

The constitutionality of the death penalty for juveniles is a substantial, legal question. The differing treatment of juveniles by the States reflects the need for this Court to resolve this important issue.

CONCLUSION

For the foregoing reasons, the petitioner, Kevin N. Stanford, prays that the Court grant his petition for a writ of certiorari to review the decision rendered by the Kentucky Supreme Court herein.

FRANK W. HEFT, JR.
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(502) 587-3800
COUNSEL FOR PETITIONER

DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

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24. Given the importance of rehabilitation to the imposition of punishment, it becomes apparent that the petitioner was substantially prejudiced when the trial court excluded testimony in the penalty phase from Robert Jones, who had worked as a juvenile counselor with the petitioner prior to the crime for which he was convicted, and offered testimony not only about the rehabilitation programs offered within the adult penal system but provided testimony about how the petitioner could personally benefit from them. See Argument III.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____, Misc., October Term, 1987

KEVIN N. STANFORD,
Petitioner,
V.
COMMONWEALTH OF KENTUCKY,
Respondent.

INDEX TO APPENDIX

CONSTITUTIONAL PROVISIONS

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KENTUCKY RULES OF CRIMINAL PROCEDURE (RCr)

RULE 9.52 AVOWALS

In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, upon request of the examining attorney the witness may make a specific offer of his answer to the question. The court shall require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

RULE 9.54 INSTRUCTIONS

(1) It shall be the duty of the court to instruct the jury in writing on the law of the case. The instructions shall be read to the jury prior to the closing summations of counsel.

(2) No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he make objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

(3) The instructions shall not make any reference to a defendant's failure to testify unless so requested by him,in which event the court shall give an instruction to the effect that he is not compelled to testify and that the jury shall not draw any inference of guilt from his election not to testify and shall not allow it to prejudice him in any way.

Supreme Court of Kentucky

83-SC-65-MR
83-SC-66-MR

KEVIN N. STANFORD — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES M. LEIBSON, JUDGE
Nos. 81-CR-1218 & 82-CR-0406

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER

On motion of the appellant, Kevin N. Stanford, a stay of execution and enforcement of this Court's opinion rendered April 30, 1987, which became final by mandate on September 3, 1987, is granted for a period of ninety (90) days to and including December 3, 1987, in order that the appellant may make application to the Supreme Court of the United States for a Writ of Certiorari. Additional stays should be obtained from the United States Supreme Court.

ENTERED September 4, 1987.

Robert F Stephens
CHIEF JUSTICE

Supreme Court of Kentucky

83-SC-65-MR
83-SC-66-MR

KEVIN N. STANFORD — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES M. LEIBSON, JUDGE
ACTION NOS. 81-CR-1218 & 82-CR-0406

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING
ORDER GRANTING PETITIONS FOR MODIFICATION

Appellant's petition for rehearing is denied.

The petitions of appellant and appellee for modification of the opinion are granted. The opinion is hereby modified by deleting pages 1,2 and 8 of the original opinion and substituting new pages 1,2 and 8 in lieu thereof.

All concur except Leibson, J., who did not sit.

ENTERED September 3, 1987.

Robert F Stephens
Chief Justice

Supreme Court of Kentucky

83-SC-65-MR
83-SC-66-MR

KEVIN N. STANFORD — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES M. LEIBSON, JUDGE
Nos. 81-CR-1218 & 82-CR-0406

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER REQUIRING MANDATE

Effective July 1, 1981, the Supreme Court adopted the following rule, CR 76.30(2)(f): "No mandate shall be required to effectuate the final decision of an appellate court, whether entered by order or by opinion." However, in order to satisfy the provisions of KRS 431.218, it is hereby ordered that the Clerk of the Supreme Court of Kentucky issue a mandate in this appeal in order to make effective the opinion disposing of the appeal.

ENTERED September 3, 1987.

Robert F. Stephens
CHIEF JUSTICE

COMMONWEALTH OF KENTUCKY

Supreme Court of Kentucky

MANDATE

KEVIN N. STANFORD

File No. 83-SC-65-MR & 83-SC-66-MR Appeal From Jefferson
VS. Opinion Rendered April 30, 1987 Circuit Court Action No. 81-CR-1218 & 82-CR-0406

COMMONWEALTH OF KENTUCKY

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and same shall be carried into execution as provided by law on the fifth Friday following the date of the issuance of this mandate, which is ordered to be certified to the Superintendent (Warden) of the Kentucky State Penitentiary at Eddyville, Kentucky.

SEPTEMBER 3, 1987 Appellant, Kevin N. Stanford's petition for rehearing of the court's opinion rendered April 30, 1987, is denied.
Appellant, Kevin N. Stanford's petition for modification of court's opinion rendered on April 30, 1987, is granted.

A Copy - Attest:

Issued ..... September 3, 1987 .....

John C. Scott
JOHN C. SCOTT, CLERK

Form SCC-9

BY _____

John C. Scott
Clerk

Office of the Clerk
SUPREME COURT OF KENTUCKY
State Capitol Frankfort, 40601

Room 209
(502) 564-4720

RECEIPT NOTICE

TO: Frank W. Heft, Jr.

FROM: John C. Scott, Clerk, Supreme Court of Kentucky

DATE: July 10, 1987

RE: KEVIN N. STANFORD V. COMMONWEALTH
File No. 83-SC-65-MR
AND
KEVIN N. STANFORD V. COMMONWEALTH
File No. 83-SC-66-MR

The document listed below has been received and filed in this office today in the above-styled case:*

—

Appellant filed MOTIONS to Reconsider
Order Entered June 29, 1987

JCS/lgf

cc: David Smith and Lloyd Vest
File

*NOTE: RESPONSE TIME TO MOTIONS BEGINS WITH THE SERVICE DATE(CR 76.34[2]
RESPONSE TIME FOR BRIEFS BEGINS WITH THE FILING DATE (CR 76.12)

Form SCC-7

John C. Scott
Clerk

Office of the Clerk
SUPREME COURT OF KENTUCKY
State Capitol Frankfort, 40601

Room 209
(502) 564-4720

RECEIPT NOTICE

TO: Frank W. Heft, Jr.

FROM: John C. Scott, Clerk, Supreme Court of Kentucky

DATE: July 10, 1987

RE: KEVIN N. STANFORD
VS
COMMONWEALTH OF KENTUCKY

File Nos. 83-SC-65-MR and 83-SC-66-MR

The document listed below has been received and filed in this office today in the above-styled case:*

Appellant filed Petition for Rehearing; Modification of Opinion.

JCS/db

cc: David Smith/C. Lloyd Vest, II
File

*NOTE: RESPONSE TIME TO MOTIONS BEGINS WITH THE SERVICE DATE(CR 76.34[2]
RESPONSE TIME FOR BRIEFS BEGINS WITH THE FILING DATE (CR 76.12)

Form SCC-7

Supreme Court of Kentucky

83-SC-65-I
83-SC-66-I

KEVIN N. STANFORD — APPELLANT

V. — APPEAL FROM JEFFERSON CIRCUIT COURT
#81-CR-1218 & #82-CR-0406
HONORABLE CHARLES M. LEIBSON, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER

Appellant's motion for leave to supplement the record and appellant's petition for rehearing with affidavits of trial counsel is denied.

Appellant's motion for leave to file a petition for rehearing in the above-styled action in excess of ten pages is denied. Appellant is hereby granted an extension of time of ten (10) days from the date of the entry of this order in which to file a petition for rehearing in conformity with CR 76.32(3)(d).

Stephens, C.J., Gant, Lambert, Stephenson, Vance and Wintersheimer, JJ., sitting. All concur.

ENTERED June 29, 1987.

Robert F. Stephens
Chief Justice

John C. Scott
Clerk

Office of the Clerk
SUPREME COURT OF KENTUCKY
State Capitol Frankfort, 40601

Room 209
(502) 564-4720

RECEIPT NOTICE

TO: Frank W. Heft, Jr.

FROM: John C. Scott, Clerk, Supreme Court of Kentucky

DATE: June 4, 1987

RE: KEVIN N. STANFORD VS. COMTH
KEVIN N. STANFORD VS. COMTH
File nos. 83-SC-65-MR
83-SC-66-MR

The document listed below has been received and filed in this office today in the above-styled case:*

Appellant filed MOTION to supplement
Record and Petition for Rehearing
and
Appellant filed MOTION to file Petition
for Rehearing in Excess of page limitation

JCS/lgf

cc: David Smith/Lloyd Vest, A.A.G.
File

*NOTE: RESPONSE TIME TO MOTIONS BEGINS WITH THE SERVICE DATE(CR 76.34[2]
RESPONSE TIME FOR BRIEFS BEGINS WITH THE FILING DATE (CR 76.12)

Form SCC-7

TO BE PUBLISHED
RENDERED: April 30, 1987
AS MODIFIED SEPTEMBER 3, 1987

Supreme Court of Kentucky

83-SC-65-MR
83-SC-66-MR

KEVIN N. STANFORD — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES M. LEIBSON, JUDGE
ACTION NOS. 81-CR-1218 & 82-CR-0406

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT

AFFIRMING

Kevin Stanford appeals from his sentence of death imposed by the Jefferson Circuit Court following a jury trial in which he was found guilty of murder, first-degree sodomy, first-degree robbery, and receiving stolen property over $100. The appellant, a 17-year-old juvenile at the time of his criminal deeds, raises numerous issues in his appeal: some are preserved, others are not. As this Court announced in Ice v. Commonwealth, Ky., 667 S.W.2d 671, 674 (1984), all prejudicial errors "must be considered, whether or not an objection was made in the trial court." Therefore, this opinion will concern itself only with the merits of the appellant's arguments and will not disregard claim of error for lack of objection unless it is apparent that the failure to object was a deliberate trial tactic.

On the evening of January 7, 1981, Barbel Poore was

repeatedly raped and sodomized during and after the commission of a robbery at the Cheker gasoline station on Cane Run Road in southwestern Jefferson County where she was employed as an attendant. The proceeds of the robbery consisted of approximately 300 cartons of cigarettes, two gallons of fuel and a small amount of cash. Following the robbery Ms. Poore was taken from the station and driven a short distance to an isolated area where she was shot twice, once in the face and once, fatally, in the head.

Based upon information obtained from a juvenile reported to be selling cigarettes and from rumors at the apartment complex near the scene of the crime where appellant resided, the police arrested Stanford on January 13, 1981. Stanford gave the police a statement, subsequently suppressed, which implicated Calvin Buchanan as the major wrongdoer in the commission of these crimes. Calvin, having no desire to return to prison from where he had recently been paroled, denied any participation in the crimes and allowed the police to tape record a conversation with his nephew, David Buchanan. During that conversation, David exonerated Calvin while admitting his involvement and that of the appellant in the crimes. David Buchanan was arrested on January 16, 1981. Following his arrest he gave the police a statement in which he confessed to rape, sodomy and robbery, and implicated Stanford as the triggerman and perpetrator of the crimes. He also implicated a third juvenile, Troy Johnson, who supplied and drove the getaway vehicle and who obtained the gun used by Stanford in the murder.

In October, 1981, following a waiver hearing, the Jefferson District Court found it was in the "interest of the community and in the interest of the child that Kevin be transferred to Circuit Court and tried under the ordinary laws governing crime."

Motions for separate trials were denied and the two were tried in August, 1982. The Commonwealth originally sought the death penalty against both defendants, but prior to trial it did not object to Buchanan's motion to exclude the application of the death penalty as to him. Buchanan received a life sentence and his conviction was upheld in his appeal to this Court.[1] Other facts will be recited as necessary for an understanding of the issues raised in this appeal.

Stanford has raised several issues in regard to the jury selection process. The procedure the trial court used was the optional method of interviewing prospective jurors individually in chambers concerning the two threshold issues of pretrial publicity and ability to consider the death penalty. The court ruled it would ask only one question concerning the death penalty issue and would not allow rehabilitation by counsel of those jurors who expressed an inability to impose the death penalty. The defendants' attorneys submitted a list of nearly 30 questions which the court declined to ask. Instead, each potential juror was asked the following question by the court: "Do you have any personal conviction against imposing the death penalty, such that

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[1] See Buchanan v. Com., Ky., 691 S.W.2d 210 (1985), cert. granted, ____ U.S. ____, 90 L. Ed. 2d 691 (1986) (85-5348).

you could not consider it under the circumstances in this or in any other case and regardless of what the evidence might be"?

The appellant alleges that the emphasized words violated the rule articulated in Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), that prospective jurors not be asked "in advance of trial whether he would in fact vote for the extreme penalty in the case before him . . . ." Id., 391 U.S. at 522, n. 21. In Ice, supra, p. 676, this court likewise held it to be error to question a juror whether he would consider imposing the death penalty in the "particular case before him."

We find no error in the form of the death-qualifying question posed to the jurors as the judge plainly asked each juror about his or her convictions "in this or in any other case," thus encompassing all such situations and not just the case to be tried. Further, the record shows that the judge was careful to explain to the veniremen that he was specifically not asking how they would decide the case at hand. While the death-qualifying question offered by the defendants, (number 24 in the list of 29)[2] may have been better phrased, there was nothing improper or prejudicial about the question asked by the trial court.

Stanford further complains he was denied his constitutional

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[2] 24. Are you so irrevocably opposed to the imposition of capital punishment in every possible case that you would be unwilling to consider all the penalties provided by law and would vote against the penalty of death regardless of facts and circumstances surrounding such individual cases?

right to a fair trial on the basis that the jury was not selected from a representative cross section of the community. This argument is based on the following three factors: (1) that the court commenced jury selection on the last day of service for those serving in the jury pool, thereby, arguably, creating a jury of volunteers[3]; (2) that on the second day of jury selection the court's procedure of interviewing prospective jurors from the pool in alphabetical order resulted in adding only those people to the pool whose last names began with the letters A-H; and (3) that the jury was death-qualified.

We find this argument to be totally without merit. There is no indication that the statute regarding jury selection, KRS 29A.060, was other than strictly complied with. That several were excused for medical, employment or other hardship reasons was a matter within the discretion of the trial court. The court, however, did not excuse all those who expressed a desire to be excused. Those interviewed were not able to "opt in or out at will," a practice denounced in United States v. Kennedy, 548 F.2d 608, 612 (5th Cir. 1977), but had to demonstrate that prolonged service would create undue problems. The procedure utilized by the trial court in the Kennedy case was that of securing jurors from lists of those whose term of duty had already expired. The Commonwealth has referred us to United

[3]The trial court excused twenty-one (21) of the 59 veniremen questioned on the first day of trial for various personal or business reasons proffered by those jurors.

States v. Anderson, 500 F.2d 312 (D.C. Cir. 1974), the facts of which more closely correspond to those in the instant case, which holds as follows:

> In separating those who could from those who could not afford to expand their service, the judge did not exclude anyone or any cognizable group. The sole criterion he employed was ability to serve longer; the panel from which the jury was drawn was distinguished only by that quality. We think a trial judge's discretion in jury selection is broad enough to encompass consideration of adverse consequences which might be suffered by jurors suddenly called to a duty prolonged materially beyond their original expectations. Id. p. 322.

The second prong of this argument is truly spurious. The appellant cannot seriously contend that the trial court violated his right to a jury comprised of a fair cross section of the community by interviewing veniremen on the second day in alphabetical order. He has not identified any "distinctive" characteristic possessed by those whose surnames begin with the letters I-Z. See Ford v. Com., Ky., 665 S.W.2d 304, 308 (1983), citing Duren v. Missouri, 439 U.S. 357. 99 S. Ct. 664, 668, 58 L. Ed. 2d 579 (1979). Moreover, had the appellant proven or articulated such characteristics, there was no error as more than half of the jurors who actually heard the case had surnames beginning with these letters. It is thus evident that the group was not excluded from the jury. Finally, as pointed out in Pope v. United States, 372 F.2d 710, 725 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968), "[t]he point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn . . . ." Thus, the court's use of a facially neutral

procedure in questioning a panel of potential jurors does no harm to a defendant's due process rights.

Concerning the exclusion of those opposed to the imposition of the death penalty, such argument was rejected by this Court in Buchanan's appeal. (See footnote 1.) Further, the case of Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc) relied upon by Stanford, was overruled by the Supreme Court in Lockhart v. McCree, ___ U.S. ____, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), which held as follows:

> "Witherspoon - excludables," or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair cross-section requirement . . . . It is for this reason that we conclude that "Witherspoon - excludables" do not constitute a "distinctive group" for cross-section purposes, and hold that "death qualification" does not violate the fair cross-section requirement."

Stanford further alleges the trial court denied him his right to a trial by an impartial jury by unduly restricting the voir dire examination. We have reviewed the record in light of this claim and find no support for this allegation. That the trial court refused to allow counsel to rehabilitate potential jurors struck for cause due to their stated inability to consider the death penalty, and further, that it refused to ask each juror during the limited in camera voir dire the exhausting list of questions posed by Stanford and his codefendant, did not in any manner, directly or by implication, hamper or impede the appellant's attorney in his questioning during the general voir dire or limit the scope of such examination at that time.

Simply put, the rulings and discussions of record concerning the list of questions proposed by the defendants never addressed the propriety of asking the questions during the general voir dire.[4] We can find no rulings on the merits of the questions nor any hint of how the court would have ruled had appellant's counsel attempted to ask the questions of the jurors during the collective voir dire. As the trial court did not make any rulings adverse to the appellant during his counsel's questioning of the jury, we can find no error prejudicial to appellant. We do not disagree with appellant that he had a right to life-qualify the jury. In this regard we agree with the Court's holding in Patterson v. Commonwealth, 283 S.E.2d 212 (Va 1981). Why, however, counsel chose not to explore "the veniremen's predilection for imposing the death penalty," id. at 215, is a question which cannot be attributed to any action or failing of the trial court.

Further, in this regard we find no error in the court's decision to strike for cause the seven jurors who indicated they would not under any circumstances impose the death penalty,

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[4] It is easy to understand why the court declined to ask the questions during the individual voir dire. Not only was the list lengthy but several of the questions were so broad in nature that it could easily have taken several weeks to complete the individual voir dire. For example, question 5 asked, "How do you feel about the death penalty being a deterrent of crime"? Question 7(b) read, "What is your definition of reasonable doubt"? We note that these specific questions were not relevant to the issue at hand, that is, that of a juror's ability to be impartial, although others were more to the point.

These jurors were not excused merely because they "voiced general objections to the death penalty . . . , Witherspoon, supra, 391 U.S. at 522, or "would rather not" impose the ultimate penalty. People v. Szabo, 94 Ill. 2d 327, 447 N.E.2d 193 (1983). Instead, the seven expressed in clear words that their attitudes were such that they could not impose the death penalty regardless of the circumstances presented. There was no equivocation as appellant would lead us to believe. The court's decision to strike the seven for cause was thus appropriate under the standard articulated in Adams v. Texas, 448 U.S. 38, 45, 100 S. Ct. 2521, 2326, 65 L. Ed. 2d 581, 589 (1980). In that case the Court concluded that only one whose views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" could be excluded from the jury. As explained in Wainwright v. Witt, ___ U.S. ___, 105 S. Ct. 844, ___ L. Ed. 2d ___ (1985), "[t]he quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of . . . ."

The appellant is correct that one may not be struck for cause merely because he would hesitate to vote for the death penalty, or has religious or philosophical qualms about imposing the penalty. Such "qualms" are to be expected. People v. Szabo, at 207. The appellant is not, however, aided by the cases cited for this proposition as, stated hereinbefore, the court did not strike any who were ambivalent. Further, the court correctly and properly inquired of those who initially expressed doubts whether or not it would be "impossible" for them to decide on the death

penalty "regardless of the evidence." Only those who affirmatively stated it would be so impossible were excused for cause. The appellant criticizes the trial court for making such inquiry, arguing that in so doing the court gave the jurors "an opportunity to escape making a difficult decision," and in effect told jurors "how to avoid serving on the case." We believe, however, that had the court failed to ascertain the extent of the jurors' views on the subject it would not have obtained the crucial information required by Adams, that is, whether their views were such as would impair their performance or duties as a juror.

That potential jurors may take probing questioning as an opportunity to sidestep their civic duty is a problem inherent in the jury selection process. That such actually occurred is a matter not likely to be evident from the record. Thus, it is incumbent upon us to trust in the impressions of the trial court. As remarked in Wainwright:

> Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id., pp. 852-853.

Concerning juror Harkess, whom the court refused to strike for cause, the court was satisfied, as are we, that she could decide the case solely on the evidence presented in court and not from media accounts. The judge found she could be "open minded" and we find nothing in her responses to the court to determine otherwise. Lastly in this category, any prejudice caused by the

prosecutor's remarks concerning reasonable doubt during voir dire was cured by the court's admonition.

The most serious issue in the appeal, we believe, is the appellant's allegation that he was denied a fair trial because of the court's refusal to grant his motion for a separate trial and/or by the court's failure to exclude during the trial the confession of his nontestifying codefendant, Buchanan.[5] This confession implicated Stanford as the triggerman in the murder and as a participant in the other crimes. The court ruled that it could "protect" Stanford by sanitizing the confession, that is, by not allowing Stanford's name to be mentioned by the witness, Detective Hall, to whom Buchanan confessed. Instead, he was consistently referred to as "some other person." As Hall related that Buchanan's expressed reason for confessing was to clear his uncle Calvin, and as Troy Johnson was referred to by name, the "other person," considering all the other evidence at trial, Stanford argues, could only have referred to him. Nevertheless, we believe the editing of his name from the

[5]Stanford additionally alleges he was entitled to a separate trial because the trial court's ruling which granted Buchanan's motion to exclude the death penalty as to him, a motion not objected to by the Commonwealth, amounted to a judicial usurpation of the jury's fact-finding role. That the Commonwealth decides to seek the death penalty against a defendant in a joint trial with a codefendant who is not death eligible does not "strip" the jury of its function in determining which defendant, if either, is ultimately responsible for the commission of the crime as charged. To accept Stanford's argument in this regard would preclude the state from ever trying defendants jointly when one is charged with a higher degree of culpability than the other.

confession was sufficient to protect his right to cross-examine inculpating witnesses, a right provided by the Confrontation Clause of the Sixth Amendment. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

Even if the admission of Buchanan's statement did constitute an error, it is subject to "harmless-error analysis," Delaware v. Van Arsdall, 475 U.S. ____, 106 S. Ct. ____, 89 L. Ed. 2d 674, 686 (1986), see also Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969), and Lee v. Illinois, 476 U.S. ____, 106 S. Ct. ____, 90 L. Ed. 2d 514 (1986), and our inquiry thus becomes whether the "error was harmless beyond a reasonable doubt." Delaware, p. 686; Lowe v. Commonwealth, Ky., 487 S.W.2d 935 (1972).

Certainly Buchanan's confession was cumulative and, although not insignificant, it did not have the devastating quality as other direct evidence of Stanford's guilt, particularly that of his own extra-judicial admissions,[6] the testimony of Troy Johnson and the physical evidence including his pubic hairs on various parts of the victim's body, and his fingerprints on the car. Considering all this other evidence before the jury, we believe the error in this case to be harmless. As the Supreme Court remarked in Schneble v. Florida, 405 U.S. 427, 432, 92 S. Ct.

[6]Stanford told Richard Reetzhe that he would blow his brains out "just like the girl." He bragged to other juveniles while in the detention center that, "I made her suck my dick," and "we fucked her in the bootie." He explained to Michael Nally that, "I had to shoot her, the bitch lived next to me and she would recognize me."

1056, 31 L. Ed. 2d 340, 345 (1972), "Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instruction, stares us in the face."

The next group of alleged errors concerns various rulings of the trial court on evidentiary matters. First the appellant asserts that the admission of his remarks to Michael Nalley, a corrections officer at the detention center, constituted a violation of his Fifth and Sixth Amendment rights not to incriminate himself and to be represented by counsel. Nalley, who heard Stanford bragging to others in the center about his misdeeds,[7] was asked by the appellant, in a conversation initiated by appellant, how much time he (Nalley) believed Stanford would have to serve for the crimes. After discussing how long and where he would serve, Nalley asked Stanford why he resorted to killing the victim of his sexual attacks. Nalley's testimony of Stanford's response is as follows:

> [H]e said, I had to shoot her, the bitch lived next to me and she would recognize me. And then, in a laughing manner, Mr. Stanford went on and he continued, he said, I guess, we could have tied her up or something or beat the piss out of her . . . and tell her if she tells, we would kill her. . . . Then after he said that he started laughing and I just shook my head, and just continued to watch TV and didn't say anything else.

This conversation occurred several days after Stanford was placed in the detention center and advised of his rights. He insisted

[7] See footnote 6, supra.

Nalley should have re-advised him of these rights, particularly his right not to be interrogated without counsel and that his failure to so warn required the suppression of Nalley's testimony. We do not agree.

In Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), relied upon by the trial court, the Supreme Court held that one who had asserted his right to be represented by counsel could not be interrogated further "unless the accused himself initiates further communication, exchanges or conversations with the police." There is no question, by asking the officer's opinion about the sentence he would receive, that Stanford "initiated" further conversation. See Oregon v. Bradshaw, 462 U.S. 1039, 1045, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983). Considering the totality of the circumstances including the fact that he initiated the conversation, the question is whether the appellant validly waived his right to silence and to have counsel present. Id., 462 U.S. at 1046. This question was answered adversely to the appellant by the trial court following the suppression hearing and the record supports its finding that the statement was voluntarily made. Stanford knew exactly who Nalley was. There was no evidence that he had any reason to believe his remarks to Nalley would be treated confidentially. Nalley certainly did nothing to keep Stanford from exercising his constitutional rights.

There is simply no merit to any of the other issues concerning the admission of evidence and we will not belabor this opinion by discussing each one individually. The findings of the

trial court contained in its opinion and order in regard to the appellant's motion to suppress are supported by the record and its legal determinations are sound.

Stanford alleges that the trial court committed substantial error in violation of the Eighth and Fourteenth Amendments and Sections 11 and 17 of our Kentucky Constitution by excluding mitigating evidence offered by the defense during the penalty phase of the trial. This assignment of error warrants more than passing comments by us.

During the penalty phase of the trial, Robert Jones, a former death row survivor, was called as a defense witness. Jones, at the time, was a supervisor for the (Louisville) Mayor's Summer Youth Program. He had experience with various programs dealing with youths on a counseling basis although he holds no academic or professional credentials. He was also vice-chairman of the Kentucky Coalition Against the Death Penalty. In that capacity he testified that he traveled about speaking to groups and conducting seminars against the death penalty. He claimed to be demonstrative evidence that one can be rehabilitated.

The trial court excluded his testimony before the jury. Jones' opinion, preserved by an avowal of why Kevin Stanford should not be executed is, partially, as follows:

> Q And, sir, could you tell me your unique relationship with the death penalty?
>
> A Well, at one time, I was on death row myself.

Jones related that in 1978 and 1979 he became familiar with Kevin Stanford while a youth counselor at a children's detention center. He talked with him again within a week before the trial

began. Jones' avowal testimony continues:

> A Yes, sir. I feel that Kevin need to be in an adult institution where the rehabilitation program and the proper training is a lots greater than it is in the juvenile facilities. I think that Kevin need discipline. I think that that Kevin's biggest problem is the lack of discipline in his life as a youth.
>
> . . . .
>
> A Sir, I truly feel that the death penalty is not appropriate for anyone I guess because my own personal experience that I've had. I am against capital punishment 1000% and I realize that even if Kevin was guilty of the crime, it's not going to bring the victim back. I feel that with his young age, that this man can be rehabilitated. And, if a 17 or 18 year old cannot be rehabilitated, then this is a failure in our correction department instead of the individual.
>
> . . . .
>
> I feel that this young man should be given this opportunity to place him in the Department of Corrections with the proper type of counseling. Now, I've heard that Kevin had a drug problem. There's no difference between a drug problem and an alcoholic problem.
>
> . . . .
>
> Q Do you think being in the penal population and being with the population in a penal system will affect Kevin?
>
> A Mentally, yes, sir.
>
> Q How will it affect him?
>
> A I feel that Eddyville will make him or break him. And, I feel with the type of program that they have at Eddyville that he'd never been exposed to in a juvenile facility, that this is another thing, he would have an opportunity to get a GED; he'd have an opportunity to get him a college education; he'd have an opportunity to get into so many type of vocational training and I think that this is what Kevin needs.
>
> . . . .
>
> Q Do you think a life sentence would wake him up to that fact?

A The life sentence is going to wake him up and the maximum security environment will wake him up.

Stanford argues that the exclusion of Jones' mitigating testimony was error of constitutional magnitude. We disagree and sustain the trial court ruling. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), sets the constitutional perimeters for dealing with the reception into evidence before a trier of fact of mitigating circumstances. The Supreme Court comments:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer [herein the jury], in all but the rarest kind of capital case [footnote omitted], not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [Here referring to footnote 12: "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense"]. [Last three emphases ours.]

KRS 532.025, our death-qualifying statute, provides in part that after a conviction of a crime for which the death penalty may be imposed by jury, the trial shall resume and the prosecuting attorney shall open and the defendant shall conclude the evidence and arguments. The statute says that the judge or the jury shall consider "any mitigating circumstances or aggravating circumstancees otherwise authorized by law" and any of the eight statutory circumstances of mitigation.

The thrust of the claim of error was that the trial court erred in not allowing the jury to hear the testimony of Robert Jones because Lockett, supra, through the Eighth and Fourteenth Amendments, requires that the sentencing body consider any

relevant evidence offered by the defense in mitigation of capital punishment. Further, KRS 532.025 authorizes the sentencing body to consider "any mitigating circumstances otherwise authorized by law."

Lockett expresses the minimum factors of what is admissible in complying with the Eighth and Fourteenth Amendments. The factors are the defendant's character, prior record and circumstances of the offense. KRS 532.025 is more expansive in that it spells out eight circumstances of mitigation that are relevant, and it contains a catch-all provision, "any mitigating circumstances otherwise authorized by law." This provision would permit the trial court to submit any redeeming evidence to the jury. However, we believe the evidence must contain facts or a qualified opinion bearing on the defendant's character, prior record or circumstances of the offense, or relative to one of the specified statutory mitigating circumstances.

Utilizing this standard, a review of Robert Jones' proffered testimony shows that it was clearly inadmissible. He had no academic or professional qualifications to allow him to offer opinion evidence. His personal knowledge of Stanford was at best minimal and remote. What very little of his testimony which might conceivably be admissible, such as the rehabilitative prospects of the defendant, was cumulative. The main theme of his testimony concerned his own philosophy about the value of the death sente.ce. We say clearly that was not admissible. The penalty phase of the trial is not an open forum for the expression of one's personal philosophical beliefs concerning the

propriety of the death penalty. If permitted, the Commonwealth could offer rebuttal testimony about the moral righteousness of the death penalty, the result being that the jury would be bombarded with philosophical and moral opinions, none of which are relevant to the decision it must reach. See Ice v. Com., Ky., 667 S.W.2d 671, 676 (1984). The trial court acted properly by excluding Robert Jones' testimony.

Stanford alleges that prejudicial error resulted when the prosecutor inquired during cross-examination of the appellant's stepfather whether he was aware that the victim was the mother of a small child. George Boller, appellant's stepfather, made a statement as a defense witness on cross-examination that the appellant was going to straighten his life out because he had a child. The prosecutor retaliated by asking Boller if he was aware that the victim had an eleven-month-old child. The matter was objected to and a motion for mistrial was lodged. The prosecutor claimed he was entitled to bring the matter out because Boller had opened the door by making a statement about the appellant's child. The trial court overruled the objection and motion for mistrial but gave the jury an admonition to disregard the nature of the information.

The statements have no relevancy or probative value and would, without question, have been suppressed if the trial court had been forewarned. Regardless, because the statements were injected before the jury, was the appellant denied a fair trial? We say no. The trial court kept the jury's mind in proper perspective with the admonition. It cured any inflammatory

nature of the statement and we see no substance or reversible error pertaining to it. We simply comment that a trial of this magnitude will invariably be marred with occasional minor or surface knicks which, when cured by the trial court, cause no substantial error.

Stanford alleges the prosecutor's closing argument in the penalty phase deprived the appellant of his right to a fair trial consonant with due process of law, as guaranteed by the Kentucky and United States Constitutions, and introduced arbitrary considerations into the jury's decision-making process.

We can see where there was no objection by trial counsel on behalf of the appellant to the prosecutor's remarks because his remarks were so unclear as to be barely intelligible even under our close scrutiny. Such remarks, in our opinion, could hardly mislead anyone hearing them. Therefore, we are not persuaded by appellant's argument and do not read into the prosecutor's remarks that which the appellant reads into them. The prosecutor told the jury that appellant showed no remorse for his crime. The appellant argues that had he shown remorse by outburst before the jury, then the prosecutor would have contended that it was contrived. This assignment of error is so baseless it warrants no further discussion. As in Marlowe v. Com., 709 S.W.2d 424, 431 (1986), we believe the jury would have returned the same sentence regardless of the comments complained of.

The appellant has devoted a substantial portion of his brief to his assertion that KRS 208.170 was applied in an unconstitutional manner in the process leading to the juvenile

court's waiver of jurisdiction over him.[8] He makes two arguments in support of this claim: (1) that the statute is applied in a racially discriminatory manner and (2) that he was found by the district court to be amenable to treatment.

Stanford has compiled a barrage of statistics in an attempt to persuade us that black youths were treated disproportionately under this statute in the juvenile division of the Jefferson District Court. The most disturbing statistic presented by Stanford is that of 56 grand jury referrals in the years 1975 through 1979, 68% were black juveniles, a group, according to the appellant's statistics, that comprised only 30% of the total number of referrals to juvenile court. He thus concludes that, although white juveniles committed twice as many offenses as blacks, they were referred to the grand jury at a rate of only half that of their black counterparts. We do not believe, however, that these statistics warrant the conclusion that race is in any way a factor in the waiver process.

It is quite possible that the percentages of grand jury referrals can be rationally explained by Stanford's figures which show black youths committed more than half of all the homicides and robberies and nearly half the asssults and rapes. More to the point, though, we find these statistics to be inadequate in drawing any conclusions bearing on this issue. For example, a factor not included in the appellant's analysis and one we

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[8]Stanford concedes that the statute is facially valid.

believe crucial in order to find appellant to have set forth a prima facie case of racial discrimination in this context is the percentage, if any, of the 56 grand jury referrals that comprise repeat offenders, those, like Stanford, for whom the state's previous attempts to rehabilitate proved unsuccessful. We are not at all persuaded by Stanford's statistics and find no evidence whatsoever to convince us that Stanford or any other juvenile was directly or indirectly the victim of racial discimination in waiver proceedings before the Jefferson District Court.

The second aspect of this allegation of error concerns the district court's finding of Stanford's amenability to treatment. Specifically the district court found that Stanford was "emotionally immature and could be amenable to treatment if properly done on a long term basis of psychotherapeutic intervention and reality based therapy for socialization and drug therapy in a residential facility." (Emphases added.) The court further found that such a facility did not exist in this state and concluded that it did not have authority to require the state to provide institutionalization outside the state or, importantly, the authority to keep Stanford institutionalized "for the length of time sufficient to provide such intervention reasonably calculated to provide rehabilitation . . . ."

The thrust of Stanford's argument is that "the state has an obligation not to execute a juvenile who is deemed to be amenable to treatment but for whom the state offers no appropriate treatment program," and that imposing the death penalty violates

the state and federal constitutional prohibitions against cruel and unusual punishment.

We are not unmoved by Stanford's arguments in this regard. Nevertheless, it is apparent from the record that Stanford has been given the benefit of treatment available to youthful offenders in the Commonwealth on a repeated basis over a period of several years before his involvement in the crimes charged in the instant case. Since the age of ten, Stanford has revolved in and out of juvenile court having committed various offenses including arson, burglary, sexual abuse, theft and assault, to name but a few. We do not know whether the county and state personnel who worked with Stanford in the various facilities in which he was placed are responsible for his failure to be rehabilitated or whether the fault lies within the appellant himself. What is clear, however, from the record and is contained in the district court's waiver order is that there was no program or treatment appropriate for the appellant in the juvenile justice system. Thus, even though he was exposed to the death penalty, the district court did not err in determining that it was in his best interest to be tried as an adult and thereby waiving jurisdiction over the appellant. Sharp v. Commonwealth, Ky., 559 S.W.2d 727 (1977). It was certainly not in his best interest, not to mention that of the community, to be committed to a treatment facility from which, after a brief period of time, he would again be free to murder or otherwise harm as he pleased.

Stanford demands that he has a constitutional right to treatment. We hold that he has already had all the treatment the

Commonwealth can provide. No less than three times in his brief he has reminded us of the previous observation of this Court, that "incorrigibility is inconsistent with youth." Workman v. Com., Ky., 429 S.W.2d 374, 378 (1968). However, as we more recently recognized in Ice v. Commonwealth, supra, at p. 680, the reality, at times, is to the contrary.

In sum, the waiver statute was appropriately followed and not unconstitutionally applied to the appellant. His age and the possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him. We do not believe the penalty to be inconsistent with any constitutional protections or requirements.

We have addressed the merits of all the issues we believe to be of any legal significance. Stanford has raised others which simply do not warrant detailed discussion. For example, he argues there was insufficient evidence to support his conviction for sodomy. Considering the position of the victim's body, that she was partially nude, that she incurred severe bruising to her anus and that the appellant's pubic hairs were found on her bare thigh as well as on other parts of her body or clothing, not to mention his statement to others repeated elsewhere in this opinion that he required her to perform both oral and anal sodomy, there can be no serious contention that there was not sufficiency of evidence to submit this charge to the jury under the standard set forth in Commonwealth v. Sawhill, 660 S.W.2d 3 (1983). Likewise, appellant's claim that the police lacked probable cause to arrest him is frivolous. The police arrested

Stanford after being informed by another juvenile who was caught selling stolen cigarettes that the cigarettes had been obtained from Stanford who admitted stealing them from the Checker station.

The remaining assignments of error are unpersuasive, not because of their argument but because of their lack of legal substance. Because of that we will not comment upon them.

Finally, as in all capital cases, we have reviewed the sentence as required by KRS 532.075. As we stated in Matthews v. Com., supra at p. 709, it is difficult to compare one murder case with another. However, we have no difficulty in stating that the sentence in the instant case is neither excessive nor disproportionate to the penalty imposed in similar cases.[9]

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[9] We have compiled data since 1970 in those cases where a death penalty has come before this Court for review, considering both aggravating and mitigating circumstances in those cases and comparing them with the present case. The cases we have considered are:

1) Halvorsen & Willoughby v. Commonwealth, ___ S.W.2d ___ (decided December 18, 1986).
2) McClellan v. Commonwealth, Ky., 715 S.W.2d 464 (1986).
3) Bevins v. Commonwealth, Ky., 712 S.W.2d 932 (1986).
4) Marlowe v. Commonwealth, Ky., 709 S.W.2d 424 (1986).
5) Matthews v. Commonwealth, Ky., 709 S.W.2d 421 (1986).
6) Holland & James v. Commonwealth, Ky., 703 S.W.2d 876 (1986).
7) Kordenbrock v. Commonwealth, Ky., 700 S.W.2d 384 (1985).
8) Ward v. Commonwealth, Ky., 695 S.W.2d 404 (1985).
9) Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985).
10) Harper v. Commonwealth, Ky., 694 S.W.2d 665 (1985).
11) White v. Commonwealth, Ky., 671 S.W.2d 241 (1984).
12) McQueen v. Commonwealth, Ky., 669 S.W.2d 519 (1984).
13) Ice v. Commonwealth, Ky., 667 S.W.2d 671 (1984).
14) Gall v. Commonwealth, Ky., 607 S.W.2d 97 (1980).
15) Smith v. Commonwealth, Ky., 599 S.W.2d 900 (1980).
16) Hudson v. Commonwealth, Ky., 597 S.W.2d 610 (1980).

(Footnote Continued)

The judgment of the Jefferson Circuit Court is affirmed.

Stephens, C.J., Gant, Lambert, Stephenson, Vance and Wintersheimer, JJ., sitting. All concur.

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(Footnote Continued)

17) Boyd v. Commonwealth, Ky., 550 S.W.2d 507 (1977).
18) Meadows v. Commonwealth, Ky., 550 S.W.2d 511 (1977).
19) Self v. Commonwealth, Ky., 550 S.W.2d 509 (1977).
20) Lenston v. Commonwealth, Ky., 497 S.W.2d 561 (1973).
21) Scott v. Commonwealth, Ky., 495 S.W.2d 800 (1973).
22) Tinsley v. Commonwealth, Ky., 495 S.W.2d 776 (1973).
23) Galbreath v. Commonwealth, Ky., 492 S.W.2d 882 (1973).
24) Caine v. Commonwealth, Ky., 491 S.W.2d 824 (1973).
25) Caldwell v. Commonwealth, Ky., 503 S.W.2d 485 (1972).
26) Leigh v. Commonwealth, Ky., 481 S.W.2d 75 (1972).
27) Call v. Commonwealth, Ky., 482 S.W.2d 770 (1972).

NO. 81 CR 1218
82 CR 0406

JEFFERSON CIRCUIT COURT
NINTH DIVISION

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS

FINAL JUDGMENT

KEVIN STANFORD — DEFENDANT

The defendant at arraingment having entered a plea of not guilty to the following charges included within the indictment; Count 1, Murder, Count 2, Robbery I, Count 4, Sodomy I and Count 5, Receiving Stolen Property Over $100.00 and having on the 2nd day August, 1982, appeared in open court with his attorney the case was tried before a jury which returned the following verdict on the 12th day of August, 1982: VERDICT NO. 2, WE, THE JURY, FIND THE DEFENDANT, KEVIN STANFORD, GUILTY OF MURDER - INTENTIONAL UNDER INSTRUCTION NO. I. /S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 8, WE, THE JURY, FIND THE DEFENDANT, KEVIN STANFORD, GUILTY OF ROBBERY IN THE FIRST DEGREE UNDER INSTRUCTION NO. IV AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS, (CONSECUTIV SENTENCE WITH ANY OTHER PRISON SENTENCE)./S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 10, WE, THE JURY, FIND THE DEFENDANT, KEVIN STANFORD, GUILTY OF SODOMY IN THE FIRST DEGREE UNDER INSTRUCTION NO. V AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS, (CONSECUTIVELY TO BE SERVED WITH ANY OTHER SENTENCE). /S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 12, WE, THE JURY, FIND THE DEFENDANT, KEVIN STANFORD, GUILTY OF RECEIVIN STOLEN PROPERTY OVER $100.00 UNDER INSTRUCTION NO. VI AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 5 YEARS, (CONSECUTIVELY SERVED). /S/ CHARLES B. CORNISH, FOREMAN.

After the jury returned the above verdicts on the defendant the court informed the jury of another phase of trial that they needed to proceed with, that beino the Death Penalty Phase. All evidence having been heard for this part of the trial, the jury returned in open count with the following verdict: WE, THE JURY, FIND THE FOLLOWING

TO BE TRUE: THAT AT THE TIME HE KILLED BAERBEL POORE THE DEFENDANT WAS ENGAGED IN A ROBBERY OF CHECKER OIL STATION, 4501 CANE RUN ROAD AND THAT IN THE COURSE OF SO DOING AND WITH INTENT TO ACCOMPLISH THE ROBRERY IN THE FIRST DEGREE HE WAS ARMED WITH A PISTOL; AND THAT AT THE TIME HE KILLED BAERBEL POORE THE DEFENDANT WAS ENGAGED IN DEVIATE SEXUAL INTERCOURSE WITH BAERBEL POORE AND THAT HE DID SO BY FORCIBLE COMPULSION. /S/ CHARLES B. CORNISH, FOREMAN. WE, THE JURY, RECOMMEND THAT THE DEFENDANT, KEVIN STANFORD, BE SENTENCED TO DEATH. /S/ CHARLES B. CORNISH, FOREMAN.

At a hearing held on August 31, 1982, the defendant, in person and by counsel made a motion for a new trial and judgment notwithstanding the verdict, evidence being heard the Court being sufficiently advised hereby ORDERS that the motion be and hereby is overruled.

On the 24th day of September, 1982, the defendant appeared in open court with his attorney, Frank Jewell and Jim Shake, and the court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel the opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and the court having informed the defendant and his counsel of the factual contents of said report with the exceptional of the official version which the defendant denies.

Having given due consideration to the written report of the Division of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the court is of the opinion that imprisonment is necessary for the protection of the public because:

A. there is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge.

B. the defendant is in the need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution.

C. probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime.

No sufficient cause having been shown why judgment should not be pronounced,

IT IS HEREBY ORDERED AND ADJUDGED BY THE COURT that the defendant is guilty of Count 2,

Robbery in the First Degree, and is sentenced to 20 years in the penitentiary; on Count 4, Sodomy in the First Degree, the defendant is sentenced to 20 years in the penitentiary; on Count 5, Receiving Stolen Property Over $100.00, the defendant is sentenced to 5 years in the penitentiary. These three sentences are ORDERED served Consecutively for a total of 45 years in the penitentiary.

From the circumstances of the present crime and the history of Kevin Stanford, the Court concludes that the defendant, Kevin Stanford is beyond rehabilitation. There is no reasonable possibility that he could be rehabilitated by any type of program, with or without lengthy incarceration. Therefore, the death penalty will be imposed.

On Count 1 of the indictment, Murder, the jury has recommended a death sentence. In the circumstances of this case, no other sentence would be appropriate. Therefore, the motion to reduce the sentence of death to life in prison or term of years, is denied.

The defendant, Kevin Stanford, on Count 1 of the indictment, the charge of Murder, is sentenced to death.

The defendant shall be taken by the Sheriff of Jefferson County and commited to the custody of the Department of Corrections, to be held as such location as the Department shall designate. This Court is required by Criminal Rule 11 04 to set a day for the execution of the death sentence, which shall be on Friday, October 29, 1982.

Pursuant to KRS 431. 220, the death sentence shall be executed by causing to pass through the body of the defendant, Kevin Stanford, a current of electricity of sufficient intensity to cause death as quickly as possible. The application of the current shall be continued until the defendant is dead.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant is hereby credited with time spent in custody prior to sentence, namely 343 days as certified by the jailer of Jefferson County towards service of the maximum term of imprisonment.

After imposing sentence, the court informed the defendant that he has a right to appeal with the assistance of counsel: that if he is financially unable to afford

an appeal, a record will be prepared for him at public expense and counsel will be appointed to represet him; that an appeal must be taken within 10 days of the date of judgment, and that the clerk of the court will prepare and file a notice of appeal for him within that time is he so requests. Defendant having made a motion to proceed with appeal in forma pauperis, the court being duly advised hereby sustains said motion.

The defendant further made a motion to stay execution of death sentence pending appeal to the Kentucky Supreme Court, and the court being duly advised sustains said motion.

The defendant, Kevin Stanford is remanded to custody without bond pending appeal.

Charles M. Leibson

CHARLES M. LEIBSON, JUDGE

ATTESTED: A TRUE COPY

PAULIE MILLER, CLERK

BY Debbie Moore D.C.

cc: FRANK JEWELL
ERNEST JASMIN

ENTERED IN COURT

SEP 28 1982

PAULIE MILLER, Clerk

By _____ Deputy Clerk

TR $ ICR 1218
28-31

NO. JEFFERSON DISTRICT COURT

JUVENILE DIVISION

IN THE INTEREST OF A CHILD
KEVIN STANFORD

FINDING OF FACT; ORDER TRANSFERRING JURISDICTION UNDER KRS 208.170 TO CIRCUIT COURT

** ** ******* **.**

This case came on before the Court on the Petition of January 14, 1981, subsequently amended by the Commonwealth with additional facts and charges with the Petition of February 20, 1981 between the two Petitions alleging that in one transaction on January 7, 1981, Kevin Stanford committed the offenses of Robbery 1st Degree, Murder, Sodomy 1st Degree, Rape 1st Degree, Kidnapping and Receiving Stolen Property in a value over $100, regarding the premises and property of the Checker Oil Station on Cane Run Road in Jefferson County and the person of Barbel Poore.

At arraignment the office of the Public Defender was appointed to represent the Defendant and counsel and member or members of the childs family have been present at all critical stages of the proceedings. The mother is not present at the time of the rendering of this decision.

Subsequent to the arraignment, proof was heard on various motions including a motion to suppress certain evidence based on procedural errors of the police in effecting the arrest. Certain evidence illegally obtained has been ordered suppressed.

On May 22, 1981, a probable cause hearing was held on the Petitions. A motion having been made by the County Attorney to transfer jurisdiction to Circuit Court pursuant to KRS 208.170.

At that hearing proof was heard from Jefferson County Police Detectives, Hall, Smith, Nash, Tangle, Mr. Billings from the Kentucky State Crime Lab or Ms. Billings, Taylor, Evidence Technician Unit, Ms. Kolb from

Metro ID, Mr. Workman from the Coroner's Office, Mr. Sanders, Alex Sloan and Troy Johnson the later being co-defendant, who has plead guilty in Juvenile Court to his participation in the alleged offenses. Probable cause was found of one count Robbery 1st Degree, a count receiving stolen property over $100, a count of Sodomy 1st Degree and a count of murder. The charge of rape was dismissed.

On July 14, 1981, as well as on August 10, 1981, and subsequently admitted defense evidence on out of state placements, proof was heard on the waiver portion of the transfer hearing. Proof was heard from Mr. Mattingly, of the Department of Human Resources, Mr. Henderson of the Department of Human Resources, Mr. Hildreth, Department of Human Resources, Mr. Matthews, Dr. Williams, Billy Ship, Linda Locking, Ellen Baum Dana Madison of the Urban League as well as filed DHR reports and various records. Based on the proof heard the court finds as to the elements for consideration the following:

1) Seriousness of the offenses - the offense alleged and for which probable cause has been found are of the most serious nature reflected by the offense against persons as a disregard for human life.

2) Age and sophistication of child - Kevin Stanford was born August 23, 1963. The offense was committed when he was 17 and he has subsequently turned 18 in the detention center. Various testimony was heard regarding his emotional maturity and sophistication. Proof was heard and the Court finds that he has a low internalization of the values and morals of society and lacks social skills. That he does possess an institutionalized personality and has, in effect, because of his chaotic family life and lack of treatment, become socialized in delinquent behavior. That he is emotionally immature and could be amenable to treatment if properly done on a long term basis of psychotherapeutic intervention and

Circuit Court and tried under the ordinary laws governing crime. At this time a Grand Jury date is set down for November 5.

Richard J. Fitzgerald

RICHARD J. FITZGERALD, Judge
Jefferson District Court

10/28/81
DATE

reality based therapy for socialization and drug therapy in a residential facility. from the record the following:

Petition and dates from records - The child has been placed in the DHS Group Home, Ormsby Village Treatment Center, Green River Boys Camp, the Department of Human Resources and Rice Audobon Vocational Educational Programs, as a result of delinquency petitions. His progress has been marginal in each based in part on the failure of the County and State to provide meaningful therapy for the child or after care intervention when he was returned after a relatively short time in each placement, to the streets of Jefferson County. His progress was basically that he learned how to behave enough to meet the minimal criteria for release each time approximately or roughly 6 months after placement, then cut loose to the same chaos and streets that he was not able to deal with, still without social skills, still delinquent and still uneducated.

As to the reason of prospects of rehabilitation in facilities available to the District Court Juvenile session, other than the possibility of a bridge status committment to the State Department of Human Resources with a minimum of approximately six months in an institution, the only facilities for a youth or child of his age with his problems would be out of state placements in specialized long term programs for youth, as per proof the child may benefit from such placement. However, the Court lacks statutory basis to order the state to provide such institutionalization for the length of time sufficient to provide such intervention reasonably calulated to provide rehabilitation, and the State of Kentucky Department of Human Resources does not, nor does Jefferson County provide a meaningful alternative.

Therefore it is the finding of the Court that it is in the interest of the community and in the interest of the child that Kevin Stanford be transferred to